recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

In accordance with Orders issued by the United States District Court of the District of Maryland on October 10, 1980, in Civil Action HM-77-1302, if the undersigned employer is not a member of the National Electrical Contractors Association, this letter of assent shall not bind the parties to any provision in the above-mentioned agreements requiring payment into the National Electrical Industry Fund, unless the above Orders of Court shall be stayed, reversed on appeal, or otherwise nullified.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

Newark Electric

[5] Name of Firm

130 Harrison Street

Street Address/P. O. Box Number

Newark, NY 14513

City, State (Abbr.), Zip Code

[6] Federal Employer Identification No. _____

SIGNED FOR THE EMPLOYER	SIGNED FOR THE UNION [3] 840 IBEW
BY [7] _____ (original signature)	BY [7] _____ (original signature)
NAME [8] James R. Colacino	NAME [8] Clark D. Culver
TITLE CEO	TITLE Business Manager
DATE 12/8/10	DATE 12/8/10

INSTRUCTIONS: All items must be completed in order for assent to be processed.

[1]TYPE OF AGREEMENT:

Insert type of agreement. Example: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

[2]NAME OF CHAPTER OR ASSOCIATION
Insert full name of NECA Chapter or Contractors Association involved.

[3]LOCAL UNION
Insert Local Union Number.

[4]EFFECTIVE DATE
Insert date that the assent for this employer becomes effective. Do not use agreement date unless that is to be the effective date of this Assent.

[5]EMPLOYER'S NAME AND ADDRESS
Print of type Company name & address.

[6]FEDERAL EMPLOYER IDENTIFICATION NO.
Insert the identification number which must appear on all forms filed by the employer with the Internal Revenue Service.

[7]SIGNATURES

[8]SIGNER'S NAME
Print or type the name of the persons signing the Letter of Assent. International Office copy must contain actual signatures - not reproduced - of a Company representative as well as a Local Union officer.

A MINIMUM OF FIVE COPIES OF THE JOINT SIGNED ASSENTS MUST BE SENT TO THE INTERNATIONAL OFFICE FOR PROCESSING. AFTER APPROVAL, THE INTERNATIONAL OFFICE WILL RETAIN ONE COPY FOR OUR FILES, FORWARD ONE COPY TO THE IBEW DISTRICT VICE PRESIDENT AND RETURN THREE COPIES TO THE LOCAL UNION OFFICE. THE LOCAL UNION SHALL RETAIN ONE COPY FOR THEIR FILES AND PROVIDE ONE COPY TO THE SIGNATORY EMPLOYER AND ONE COPY TO THE LOCAL NECA CHAPTER.

Ex. R-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RONALD K. HOOKS, Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

KITSAP TENANT SUPPORT SERVICES, INC.,

Respondent.

CASE NO. C13-5470 BHS

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter comes before the Court on Respondent Kitsap Tenant Support Services, Inc.'s ("Kitsap") motion to dismiss (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On June 13, 2013, Petitioner Ronald K. Hooks ("Hooks"), Regional Director for Region 19 of the National Labor Relations Board (the "Board"), filed a petition for preliminary injunctive relief pursuant to § 10(j) of the National Labor Relations Act. Dkt. 1.

On July 18, 2013, Kitsap filed a motion to dismiss. Dkt. 12. On August 5, 2013, the Board responded. Dkt. 14. On August 9, 2013, Kitsap responded. Dkt. 41.

II. FACTUAL BACKGROUND

The Board consists of five members who are appointed for five-year terms by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a).

On January 4, 2013, President Obama appointed members Terence Flynn, Shannon Block ("Block") and Richard Griffin, Jr. ("Griffin") to the Board. Although the Senate was in session that day, President Obama chose not to nominate these individuals for confirmation by the Senate.

On February 28, 2013, Hooks issued an Amended Consolidated Complaint in the underlying administrative action. On March 27, 2013, Hooks subsequently issued a Second Amended Consolidated Complaint, which was then amended on April 16, 2013. On May 28, 2013, Hooks again amended the Complaint.

On July 16, 2013, the President submitted new nominations to the Board. On July 30, 2013, the Senate confirmed all five positions on the Board.

III. DISCUSSION

The Recess Appointment clause provides that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl.3.

In this case, Kitasp contends that the Board is without power to act because it lacks a properly appointed quorum. Kitsap has provided numerous recent cases for the

proposition that "Recess" means the period of time between an adjournment *sine die* and the start of the Senate's next session. *See* Dkt. 41 at 2–3 (listing cases). While none of these cases are binding, the Court has reviewed each case and finds the legal analysis persuasive. There is no need to add to what is thoroughly explained in *N.L.R.B. v. Enterprise Leasing Co. Southeast, LLC*, --- F.3d ----, 2013 WL 3722388 (4th Cir. 2013), and *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3rd Cir. 2013). Therefore, the Court adopts the reasoning in these cases and holds that "Recess" in the Recess Appointment Clause means the period of time between an adjournment *sine die* and the start of the Senate's next session.

As applied to the facts of this case, Hooks was without power to file the complaints against Kitsap in the underlying administrative matter. A petition for injunctive relief brought under Section 10(j) may be brought only "upon issuance of a complaint as provided in [29 U.S.C. § 160(b)]." 29 U.S.C. § 160(j). Without a valid complaint, Hooks is precluded from filing a petition for preliminary relief. Therefore, the Court grants Kitsap's motion to dismiss on this issue.

Hooks contends that, even if the Board lacks authorization, the actions of the Acting General Counsel Lafe E. Solomon ("Solomon"), including his delegation of authority to initiate legal action to Hooks, are still valid. First, Hooks asserts that President Obama validly appointed Solomon pursuant to the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq*. Dkt. 13 at 14–21. The FVRA, however, only permits the appointment of a person under specific circumstances and the only circumstance that could apply to Hooks is appointing a person who, within the last 365

days, has served as a personal assistant to the departing officer. *Id.* § 3345(b). It is undisputed that Solomon has never served as a first assistant. Therefore, Hooks's argument is without merit.

Second, Hooks contends that the actions of Solomon are exempted from the penalty provisions of the FVRA and are, therefore, valid. Dkt. 13 at 17. Hooks is correct that the actions of Solomon are exempted from the penalty provision. This fact, however, does not grant him the authority to act pursuant to an improper appointment. Therefore, Hooks's argument is without merit.

IV. ORDER

Therefore, it is hereby **ORDERED** that Kitsap's motion to dismiss (Dkt. 12) is **GRANTED** and Hooks's petition is **DISMISSED**.

Dated this 13th day of August, 2013.

BENJAMIN H. SETTLE
United States District Judge

Ex. R-2

LETTER OF ASSENT C

This document shall be used only for employers becoming signatory for the first time or for first time contractors seeking affiliation as a direct result of a Membership Development campaign.

This is to certify that the undersigned employer has examined a copy of the current [1] Inside Construction labor agreement between [2] Finger Lakes Chapter NECA and Local Union [3] 840, IBEW. It is understood that the signing of this letter of assent shall be as binding on the undersigned employer as though he had signed the above referred to agreement, including any amendments thereto, and any subsequent agreements.

This letter of assent shall become effective for the undersigned employer on the [4] 9th day of November, 2010 and shall remain in effect unless and until terminated as provided in the following paragraphs.

1. This letter of assent cannot be terminated within the first 180 days from its effective date, above.

2. After the first 180 days and within the first twelve (12) months from the effective date of this letter of assent, the undersigned employer may terminate this letter of assent and the collective bargaining agreement by giving written notice to [2] Finger Lakes Chapt. NECA and the local union at least thirty (30) days prior to the selected termination date. If such notice is given but the undersigned employer has an outstanding debt to the local union or to any of the funds specified in the collective bargaining agreement on the selected date, the termination shall become effective when, following the selected termination date, payment in full of any outstanding debt to the local union or to any of the funds specified in the collective bargaining agreement has been made. Such payment of outstanding debt shall include those payments otherwise due as a result of this extension of the agreement caused by the outstanding debt.

3. After the first twelve (12) months from the effective date of this letter of assent, the undersigned employer shall be bound to the then current agreement between the parties until its stated termination date, as well as to all subsequent amendments and renewals. If the undersigned employer desires to terminate this letter of assent and does NOT intend to comply with and be bound by all of the provisions in any subsequent agreements between [2] Finger Lakes Chapter NECA and Local Union [3] 840, IBEW, he shall so notify [2] Finger Lakes Chapter NECA and the Local Union in writing at least one hundred (100) days prior to the termination date of the then current agreement.

After the twelve (12) months from the effective date of this letter of assent, the Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will

General Counsel's Exhibit

recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

In accordance with Orders issued by the United States District Court of the District of Maryland on October 10, 1980, in Civil Action HM-77-1302, if the undersigned employer is not a member of the National Electrical Contractors Association, this letter of assent shall not bind the parties to any provision in the above-mentioned agreements requiring payment into the National Electrical Industry Fund, unless the above Orders of Court shall be stayed, reversed on appeal, or otherwise nullified.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

Newark Electric

[5] Name of Firm

141 Harrison Street

Street Address/P. O. Box Number

Newark, N.Y., 14513

City, State (Abbr.), Zip Code

[6] Federal Employer Identification No. _____

SIGNED FOR THE EMPLOYER	SIGNED FOR THE UNION [3] 840 IBEW
BY [7] _____ (original signature)	BY [7] _____ (original signature)
NAME [8] James R. Colacino	NAME [8] Clark D. Culver
TITLE President/CEO	TITLE Business Manager
DATE 11/9/2010	DATE 11/9/2010

INSTRUCTIONS: All items must be completed in order for assent to be processed.

[1]TYPE OF AGREEMENT:
Insert type of agreement. Example: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

[2]NAME OF CHAPTER OR ASSOCIATION
Insert full name of NECA Chapter or Contractors Association involved.

[3]LOCAL UNION
Insert Local Union Number.

[4]EFFECTIVE DATE
Insert date that the assent for this employer becomes effective. Do not use agreement date unless that is to be the effective date of this Assent.

[5]EMPLOYER'S NAME AND ADDRESS
Print of type Company name & address.

[6]FEDERAL EMPLOYER IDENTIFICATION NO.
Insert the identification number which must appear on all forms filed by the employer with the Internal Revenue Service.

[7]SIGNATURES

[8]SIGNER'S NAME
Print or type the name of the persons signing the Letter of Assent. International Office copy must contain actual signatures - not reproduced - of a Company representative as well as a Local Union officer.

A MINIMUM OF FIVE COPIES OF THE JOINT SIGNED ASSENTS MUST BE SENT TO THE INTERNATIONAL OFFICE FOR PROCESSING. AFTER APPROVAL, THE INTERNATIONAL OFFICE WILL RETAIN ONE COPY FOR OUR FILES, FORWARD ONE COPY TO THE IBEW DISTRICT VICE PRESIDENT AND RETURN THREE COPIES TO THE LOCAL UNION OFFICE. THE LOCAL UNION SHALL RETAIN ONE COPY FOR THEIR FILES AND PROVIDE ONE COPY TO THE SIGNATORY EMPLOYER AND ONE COPY TO THE LOCAL NECA CHAPTER.

LETTER OF ASSENT - A

In signing this letter of assent, the undersigned firm does herby authorize[1] Finger Lakes Chapter NECA as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved[2] Inside labor agreement between the [1] Finger Lakes Chapter NECA and Local Union[3] 840, IBEW.

In doing so, the undersigned firm agrees to comply with, and be bound by, all of the provisions contained in said current and subsequent approved labor agreements. This authorization, in compliance with the current approved labor agreement, shall become effective on the[4] 8th day of December, 2010.

It shall remain in effect until terminated by the undersigned employer giving written notice to the [1] Finger Lakes Chapter NECA and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.

The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

In accordance with Orders issued by the United States District Court for the District of Maryland on October 10, 1980, in Civil Action HM-77-1302, if the undersigned employer is not a member of the National Electrical Contractors Association, this letter of assent shall not bind the parties to any provision in the above-mentioned agreement requiring payment into the National Electrical Industry Fund, unless the above Orders of Court shall be stayed, reversed on appeal, or otherwise nullified.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

Newark Electric
[5] Name of Firm

130 Harrison Street
Street Address/P.O. Box Number

Newark, NY 14513
City, State (Abbr.) Zip Code

[6] Federal Employer Identification No.: _____

SIGNED FOR THE EMPLOYER

BY[7] _____ (original signature)

NAME[8] James R. Colacino

TITLE/DATE CEO 12/8/10

SIGNED FOR THE UNION[3] 840, IBEW

BY[7] _____ (original signature)

NAME[8] Clark D. Culver

TITLE/DATE Business Manager 12/8/10

INSTRUCTIONS (All items must be completed in order for assent to be processed)

[1] NAME OF CHAPTER OR ASSOCIATION
Insert full name of NECA Chapter or Contractors Association involved.

[2] TYPE OF AGREEMENT
Insert type of agreement. Example: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

[3] LOCAL UNION
Insert Local Union Number.

[4] EFFECTIVE DATE
Insert date that the assent for this employer becomes effective. Do not use agreement date unless that is to be the effective date of this Assent.

[5] EMPLOYER'S NAME & ADDRESS
Print or type Company name & address.

[6] FEDERAL EMPLOYER IDENTIFICATION NO.
Insert the identification number which must appear on all forms filed by the employer with the Internal Revenue Service.

[7] SIGNATURES

[8] SIGNER'S NAME
Print or type the name of the person signing the Letter of Assent. International Office copy must contain actual signatures-not reproduced-of a Company representative as well as a Local Union officer.

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General Counsel's Exhibit

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This document shall be used only for employers becoming signatory for the first time or for first time contractors seeking affiliation as a direct result of a Membership Development campaign.

This is to certify that the undersigned employer has examined a copy of the current [1] Inside labor agreement between [2] Finger Lakes Chapt. NECA and Local Union [3] 840, IBEW. It is understood that the signing of this letter of assent shall be as binding on the undersigned employer as though he had signed the above referred to agreement, including any amendments thereto, and any subsequent agreements.

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1. This letter of assent cannot be terminated within the first 180 days from its effective date, above.

2. After the first 180 days and within the first twelve (12) months from the effective date of this letter of assent, the undersigned employer may terminate this letter of assent and the collective bargaining agreement by giving written notice to [2] Finger Lakes Chapt. NECA and the local union at least thirty (30) days prior to the selected termination date. If such notice is given but the undersigned employer has an outstanding debt to the local union or to any of the funds specified in the collective bargaining agreement on the selected date, the termination shall become effective when, following the selected termination date, payment in full of any outstanding debt to the local union or to any of the funds specified in the collective bargaining agreement has been made. Such payment of outstanding debt shall include those payments otherwise due as a result of this extension of the agreement caused by the outstanding debt.

3. After the first twelve (12) months from the effective date of this letter of assent, the undersigned employer shall be bound to the then current agreement between the parties until its stated termination date, as well as to all subsequent amendments and renewals. If the undersigned employer desires to terminate this letter of assent and does NOT intend to comply with and be bound by all of the provisions in any subsequent agreements between [2] Finger Lakes Chapt. NECA and Local Union [3] 840, IBEW, he shall so notify [2] Finger Lakes Chapt. NECA and the Local Union in writing at least one hundred (100) days prior to the termination date of the then current agreement.

After the twelve (12) months from the effective date of this letter of assent, the Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will

General Counsel's Exhibit

recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

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SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

Newark Electric

[5] Name of Firm

130 Harrison Street

Street Address/P. O. Box Number

Newark, NY 14513

City, State (Abbr.), Zip Code

[6] Federal Employer Identification No. _____

SIGNED FOR THE EMPLOYER

BY [7] _____
(original signature)

NAME [8] James R. Colacino

TITLE CEO

DATE 12/8/10

SIGNED FOR THE UNION [3] 840 IBEW

BY [7] _____
(original signature)

NAME [8] Clark D. Culver

TITLE Business Manager

DATE 12/8/10

INSTRUCTIONS: All items must be completed in order for assent to be processed.

[1]TYPE OF AGREEMENT:

Insert type of agreement. Example: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

[2]NAME OF CHAPTER OR ASSOCIATION
Insert full name of NECA Chapter or Contractors Association involved.

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Insert Local Union Number.

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Print of type Company name & address.

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[8]SIGNER'S NAME
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Ex. R-3

State of New York
Department of State } ss:

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.

Witness my hand and seal of the Department of State on FEB 14 2000

STATE OF NEW YORK
EXCELSIOR
DEPARTMENT OF STATE

Special Deputy Secretary of State

DOS-1266 (5/96)

F000210000636
CSC 45

CERTIFICATE OF INCORPORATION

OF

COLACINO INDUSTRIES, INC.

UNDER SECTION 402 OF THE BUSINESS CORPORATION LAW

The undersigned, a natural person of the age of eighteen years or over, desiring to form a corporation pursuant to the provisions of Section 402 of the Business Corporation Law of the State of New York, hereby certifies as follows:

FIRST: The name of the corporation is:

COLACINO INDUSTRIES, INC.

SECOND: The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the Business Corporation Law of the State of New York, exclusive of any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained.

THIRD: The office of the corporation in the State of New York is to be located in the County of Wayne.

FOURTH: The aggregate number of shares which the corporation shall have the authority to issue is:

Two Hundred (200) shares without par value.

FIFTH: The Secretary of State is designated as the agent of the corporation upon whom process against the corporation may be served, and the address to which the Secretary of State shall mail a copy of any process against the corporation served upon him is:

129 Harrison Street
Newark, NY 14513

SIXTH: No director of the corporation shall be personally liable to the corporation or its stockholders for damages for any breach of duty in such capacity except where a judgment or other final adjudication adverse to said director establishes: that the director's acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that said director personally gained a financial profit or other advantage to which he was not entitled, or the director's acts violated Section 719 of the New York Business Corporation Law.

Date: February 10, 2000

Judith Ann Carkner
Incorporator
Corporation Service Company
80 State Street
Albany, NY 12207

2

F000210000636

CSC 45

CERTIFICATE OF INCORPORATION

OF

COLACINO INDUSTRIES, INC.

Section 402 of the Business Corporation Law

FILED
FEB 10 2 38 PM '00

Filer: MR. JAMES COLACINO
129 HARRISON STREET
NEWARK, NY 14513
Cust. Ref#583208AJC

DRAWDOWN

1CC
STATE OF NEW YORK
DEPARTMENT OF STATE
FILED FEB 10 2000
TAX $ 10
BY: SRU
Wayne

000210000672

3

N. Y. S. DEPARTMENT OF STATE
DIVISION OF CORPORATIONS AND STATE RECORDS ALBANY, NY 12231-0001

FILING RECEIPT

ENTITY NAME: COLACINO INDUSTRIES, INC.

DOCUMENT TYPE: INCORPORATION (DOM. BUSINESS) COUNTY: WAYN

SERVICE COMPANY: CSC NETWORKS/PRENTICE HALL SERVICE CODE: 45 *

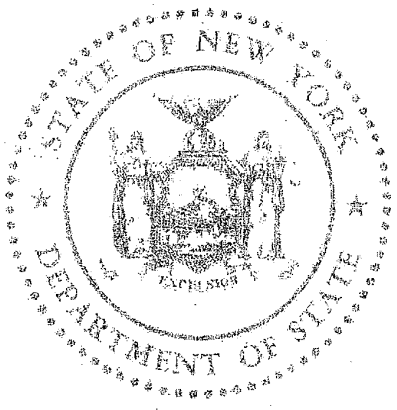
FILED:02/10/2000 DURATION:PERPETUAL CASH#:000210000672 FILM #:000210000636

ADDRESS FOR PROCESS
THE CORPORATION
129 HARRISON STREET
NEWARK, NY 14513

EXIST DATE
02/10/2000

REGISTERED AGENT

STOCK: 200 NPV



FILER	FEES	170.00	PAYMENTS	170.00
	FILING	125.00	CASH	0.00
MR JAMES COLACINO	TAX	10.00	CHECK	0.00
129 HARRISON STREET	CERT	0.00	CHARGE	0.00
	COPIES	10.00	DRAWDOWN	170.00
NEWARK, NY 14513	HANDLING	25.00	BILLED	0.00
			REFUND	0.00

DOS-1025 (11/89)

Ex. R-4

Form **966** (Rev. December 2007)
Department of the Treasury
Internal Revenue Service

Corporate Dissolution or Liquidation

(Required under section 6043(a) of the Internal Revenue Code)

OMB No. 1545-0041

Please type or print

Name of corporation: NEWARK ELECTRIC 2.0, INC.

Employer identification number: 27-5569956

Number, street, and room or suite no. (If a P.O. box number, see instructions.): 126 HARRISON STREET

City or town, state, and ZIP code: NEWARK, NY 14513

Check type of return: ☐ 1120 ☐ 1120-L ☐ 1120-IC-DISC ☒ 1120S ☐ Other ▶

1 Date incorporated	2 Place incorporated	3 Type of liquidation	4 Date resolution or plan of complete or partial liquidation was adopted
03/08/2011	NEW YORK	☒ Complete ☐ Partial	07/31/12

5 Service Center where corporation filed its immediately preceding tax return	6 Last month, day, and year of immediately preceding tax year	7a Last month, day, and year of final tax year	7b Was corporation's final tax return filed as part of a consolidated income tax return? If "Yes," complete 7c, 7d, and 7e.
EFILE	12/31/11	07/31/12	☐ Yes ☒ No

7c Name of common parent	7d Employer identification number of common parent	7e Service Center where consolidated return was filed

	Common	Preferred
8 Total number of shares outstanding at time of adoption of plan of liquidation	100.000	.000

9 Date(s) of any amendments to plan of dissolution

10 Section of the Code under which the corporation is to be dissolved or liquidated: IRC SECTION 332

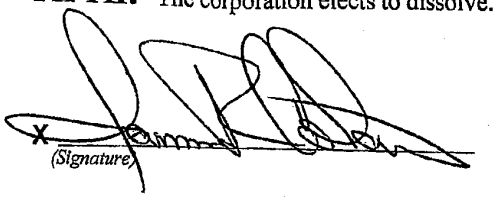
11 If this form concerns an amendment or supplement to resolution or plan, enter the date the previous Form 966 was filed

Attach a certified copy of the resolution or plan and all amendments or supplements not previously filed.

Under penalties of perjury, I declare that I have examined this form, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of officer	Title	Date
	PRESIDENT	9/4/12

FIFTH: The corporation elects to dissolve.



(Signature)

James R. Colacino
(Print or Type Name of Signer)

President
(Print or Type Title of Signer)

CERTIFICATE OF DISSOLUTION OF

Newark Electric 2.0 Inc.
(Insert Name of Corporation)

Under Section 1003 of the Business Corporation Law

Filer's Name: James R. Colacino

Address: 406 Sycamore Trail

City, State and Zip Code: Newark, New York 14513

NOTES:

1. The name of the corporation and its date of incorporation must be exactly as they appear on the records of the Department of State. This information should be verified on the Department of State's web site at www.dos.ny.gov.
2. This certificate must be signed by an officer, director or duly authorized person.
3. Attach the consent of the NYS Department of Taxation and Finance.
4. Attach the consent of the New York City Department of Finance, if required.
5. The fee for filing this certificate is **$60**, made payable to the Department of State.

For DOS Use Only

DIVISION OF CORPORATIONS AND STATE RECORDS ALBANY, NY 12231-0001

FILING RECEIPT

ENTITY NAME: NEWARK ELECTRIC 2.0 INC.

DOCUMENT TYPE: DISSOLUTION (DOMESTIC) COUNTY: WAYN

FILED:11/05/2012 DURATION:********* CASH#:121105000973 FILM #:121105000913

FILER:

JAMES R. COLACINO
406 SYCAMORE TRAIL

NEWARK, NY 14513

ADDRESS FOR PROCESS:

REGISTERED AGENT:

SERVICE COMPANY: ** NO SERVICE COMPANY ** SERVICE CODE: 00

FEES	60.00	PAYMENTS	60.00
FILING	60.00	CASH	0.00
TAX	0.00	CHECK	60.00
CERT	0.00	CHARGE	0.00
COPIES	0.00	DRAWDOWN	0.00
HANDLING	0.00	OPAL	0.00
		REFUND	0.00

DOS-1025 (04/2007)

New York State Department of Labor
Unemployment Insurance Registration Section
WA Harriman State Office Building Campus
Albany, New York 12240-0339

COPY

EMPLOYER NUMBER: 49-90058 6

DATE: 08/29/12

NEWARK ELECTRIC 20 INC
126 HARRISON ST STE A
NEWARK NY 14513-1200

IN REPLY, REFER TO
LIABILITY AND DETERMINATION
REGISTRATION SUBSECTION
(518) 457-2635

Our records show you had no payroll during at least four consecutive calendar quarters.

If you no longer have employees, you may terminate your liability for filing unemployment insurance reports by completing Section I below and returning this letter.

If your business is a corporation (including Subchapter S corporations), please remember that any compensation paid to a corporate officer is remuneration and must be reported. Under such circumstances, your liability cannot be terminated.

If you have discontinued business, please complete Section II below showing the date on which you closed your business. If the business was sold or transferred, indicate the name and address of the acquiring employer.

If the corporation or business is still active without payroll, please explain in Section III below.

Sign and date the form, providing signer's address and title in Section IV below.

Richard Marino, Director
Unemployment Insurance Director

I. TERMINATION OF LIABILITY

☐ I wish to terminate liability. There are no employees. (If business or corporation is still active, see Section III.)

II. CLOSING INFORMATION

☒ Business discontinued.
Date 07 / 31 / 2012
month day year

☐ Business sold or transferred.
Date _____
month day year

Name and address of acquiring employer

_____

_____

_____

Employer Registration Number of acquiring employer (if known)_____

III. BUSINESS STILL ACTIVE

If the business or corporation is still active, please explain below how activity is conducted with no payroll, especially to corporate officers.

_____

_____

_____

_____

_____

_____

_____

IV. SIGNATURE _____

Signer's address 126 Harrison Street
Newark, New York 14513

Official position President

Date 10/5/12

IA 31.5 (08-07)

New York State Department of
Taxation and Finance
Office of Processing and Taxpayer Services
W A Harriman Campus
Albany NY 12227

Consent date: 10/11/2012

120938958803OO-AD00

Filed by:
NEWARK ELECTRIC 2.0 INC.
126 HARRISON ST
NEWARK NY 14513-1200

COPY

Consent to Dissolution of a Corporation

New York State Department of Taxation and Finance - Corporation Tax
Albany NY 12227

To the Secretary of State

Name of corporation

NEWARK ELECTRIC 2.0 INC.

Pursuant to provisions of section 1004 of Article 10 of the Business Corporation Law, the Commissioner of Taxation and Finance Hereby consents to the Dissolution of the above named corporation.

This consent is effective until 12/31/2012

The Certificate of Dissolution must be received and filed by the Department of State before this date.

By: Margaret M. Sherman
For the Commissioner of Taxation and Finance

Instructions

To complete the process of dissolution of your corporation, you must mail the following three items to the Department of State:

1. Form TR-960, *Consent to Dissolution of a Corporation* (this form)
2. Filing fee of $60 (make check payable to ***NYS Department of State)***
3. *Certificate of Dissolution*, properly completed. Please refer to *www.dos.state.ny.us/corps/vdissolu.html* for step-by-step instructions.

Mail the items listed above to:

NEW YORK STATE DEPARTMENT OF STATE
DIVISION OF CORPORATIONS
ONE COMMERCE PLAZA
99 WASHINGTON AVE, SUITE 600
ALBANY NY 12231

Note: Do not mail the information to the NYS Tax Department.

The NYS Department of State will review the forms you submit. If they approve the dissolution, they will notify you of the filing date, which is when the corporation's obligation to pay taxes and fees ends.

The dissolution of your corporation is not final until it is filed by the Department of State.

****Important****

The name of the corporation and its date of incorporation must be exactly as they appear on the records of the Department of State. This information should be verified on the Department of State's Web site at *www.dos.state.ny.us/corps/*

Need help?

Visit our Web site at ***www.tax.ny.gov***
- get information and manage your taxes online
- check for new online services and features

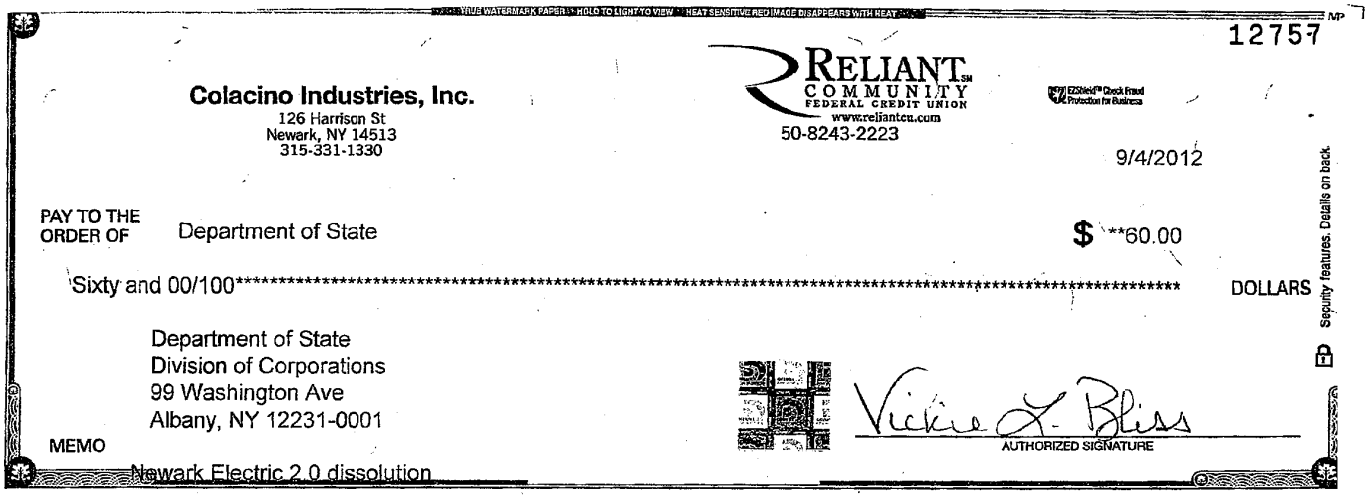
Text Telephone (TTY) Hotline (for persons with hearing and speech disabilities using a TTY): If you have access to a TTY, contact us at (518) 485-5082. If you do not own a TTY, check with independent living centers or community action programs to find out where machines are available for public use.

Telephone assistance

Corporation Tax Information Center: (518) 485-6027

To order forms and publications: (518) 457-5431

Persons with disabilities: In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms, and other facilities are accessible to persons with disabilities. If you have questions about special accommodations for persons with disabilities, call the information center.



12757

Colacino Industries, Inc.
126 Harrison St
Newark, NY 14513
315-331-1330

RELIANT COMMUNITY FEDERAL CREDIT UNION
www.reliantcu.com
50-8243-2223

9/4/2012

PAY TO THE ORDER OF Department of State

$ **60.00

Sixty and 00/100********** DOLLARS

Department of State
Division of Corporations
99 Washington Ave
Albany, NY 12231-0001

MEMO Newark Electric 2.0 dissolution

Vickie L. Bliss
AUTHORIZED SIGNATURE

Security features. Details on back.

⑈012757⑈ ⑆222382438⑆ 100275701 9⑈

Colacino Industries, Inc.

12757

Department of State		9/4/2012	
	Dissolution fee for NE2.0		60.00

WCTA Regular Check Newark Electric 2.0 dissolution 60.00

Certified Public Accountants | 280 Kenneth Drive, Suite 100 | Rochester, New York 14623 | 585.427.8900 | EFPRotenberg.com

EFP ROTENBERG, LLP
what counts

July 31, 2012

Newark Electric 2.0, Inc.
126 Harrison Street
Newark, NY 14513

Instruction for Filing Form **NY Certificate of Dissolution**

This application is to be mailed to the address below **after receipt of the Consent to Dissolve from NYS Department of Taxation and Finance. The Consent to Dissolve must be attached to the Certificate of Dissolution.** The NY Certificate of Dissolution must be signed by:

- ☐ You
- ☐ You and Your Wife
- ☐ Authorized Partner
- ☒ An Authorized Corporate Officer

Also,

- ☐ $ will be refunded.
- ☐ Have the form notarized.
- ☐ No payment is required with this form.
- ☒ Attach remittance, making check payable to **Department of State** in the amount of $ 60.00

Mail to:

New York State Department of State
Division of Corporations, State Records and Uniform Commercial Code
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231

Please mail us copies of the cleared check and the consent to dissolve once received.

Very truly yours,

EFP Rotenberg, LLP

New York State Department of State
Division of Corporations, State Records and Uniform Commercial Code
One Commerce Plaza, 99 Washington Avenue Albany, NY 12231
www.dos.ny.gov

CERTIFICATE OF DISSOLUTION OF

Newark Electric 2.0 Inc.

(Insert Name of Corporation)

Under Section 1003 of the Business Corporation Law

FIRST: The name of the corporation is:

Newark Electric 2.0 Inc.

If the name of the corporation has been changed, the name under which it was formed is:

SECOND: The certificate of incorporation was filed with the Department of State on:

March 8, 2011

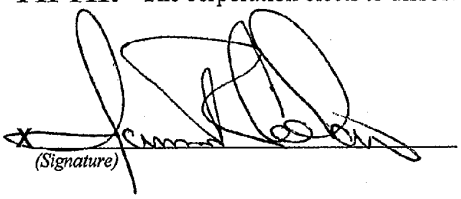
THIRD: The name and address of each officer and director of the corporation is:

James R. Colacino, President
406 Sycamore Trail, Newark, New York 14513

FOURTH: *(Check the statement that applies)*

- ☐ The dissolution was authorized at a meeting of shareholders by two-thirds of the votes of all outstanding shares entitled to vote.
- ☐ The dissolution was authorized at a meeting of shareholders by a majority of the votes of all outstanding shares entitled to vote.
- ☒ The dissolution was authorized by the unanimous written consent of the holders of all outstanding shares entitled to vote without a meeting.

FIFTH: The corporation elects to dissolve.



(Signature)

James R. Colacino
(Print or Type Name of Signer)

President
(Print or Type Title of Signer)

CERTIFICATE OF DISSOLUTION
OF

Newark Electric 2.0 Inc.
(Insert Name of Corporation)

Under Section 1003 of the Business Corporation Law

Filer's Name: James R. Colacino

Address: 406 Sycamore Trail

City, State and Zip Code: Newark, New York 14513

NOTES:

1. The name of the corporation and its date of incorporation must be exactly as they appear on the records of the Department of State. This information should be verified on the Department of State's web site at www.dos.ny.gov.
2. This certificate must be signed by an officer, director or duly authorized person.
3. Attach the consent of the NYS Department of Taxation and Finance.
4. Attach the consent of the New York City Department of Finance, if required.
5. The fee for filing this certificate is **$60**, made payable to the Department of State.

For DOS Use Only

Ex. R-5

A580015

CERTIFICATE OF INCORPORATION

CERTIFICATE OF INCORPORATION of "NEWARK ELECTRIC CORP.", pursuant to Section 402 of the New York Business Corporation Law.

The undersigned, for the purpose of forming a corporation pursuant to Section 402 of the Business Corporation Law, does hereby certify as follows:

1. The name of the corporation shall be "NEWARK ELECTRIC CORP."

2. The purposes of the corporation for which it is formed are:

> To solicit, bid for, enter into and perform contracts for the doing of electrical work and the furnishing of electrical machinery, appliances, accessories, materials and supplies of all kinds. To design, install, remove, repair, inspect, buy, sell and deal in apparatus, accessories, equipment, supplies and materials for the doing of electrical work.

The foregoing provisions of this Article shall be construed both as purposes and powers and each as an independent purpose and power which the corporation may have under present and future laws of the State of New York, and purposes and powers hereinbefore specified shall, except when otherwise provided in this Article 2, be in no wise limited or restricted by reference to, or inference from, the terms of any provisions of this or any other article of this Certificate of Incorporation; but such provisions shall not be construed to permit the corporation to carry on any business, or to exercise any power, or to do any action which a corporation now or hereafter

CERTIFICATE OF INCORPORATION

-2-

organized under the Business Corporation Law of the State of New York may not at any time lawfully carry on, exercise or do; and provided further that the Corporation shall not carry on any business or exercise any power in any state, territory, or country which under the laws thereof the Corporation may not lawfully carry on or exercise.

3. The aggregate number of shares which the Corporation shall have authority to issue is Two Hundred (200) shares, all of which are to be without par value.

4. The office of the Corporation is to be located in the Village of Newark, County of Wayne and State of New York, P. O. Box 374.

5. The Secretary of State of the State of New York is designated as the agent of the Corporation upon whom process against it may be served and the Post Office Address to which the Secretary of State shall mail a copy of any such process served upon him is P.O. Box 374, in the Village of Newark, County of Wayne and State of New York 14513.

6. The subscriber is a natural person over the age of twenty-one years.

7. The accounting period shall be the calendar year.

IN WITNESS WHEREOF, I have made and subscribed this certificate on this __ day of May, 1973.

Richard J. Colacino

Richard J. Colacino
P. O. Box 374
Newark, New York 14513

STATE OF NEW YORK)
) SS:
COUNTY OF WAYNE)

On this 22nd day of May, 1979, before me, the subscriber, personally came RICHARD J. COLACINO, to me known and known to me to be the same person described in, and who executed the foregoing Certificate of Incorporation, and he duly acknowledged to me that he executed the same.

Notary Public
STEPHEN P. SIPKIN
NOTARY PUBLIC in the County of Wayne
New York State No. 30-4640
My Commission expires Mar. 30, 19[illegible]

3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

NEWARK ELECTRIC CORP.,
NEWARK ELECTRIC 2.0, INC.,
AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and **Case No. 3-CA-088127**

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 840

EMPLOYER'S POST-HEARING BRIEF

HARRIS BEACH PLLC

Edward A. Trevvett
Attorneys for Employer
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800
Facsimile: (585) 419-8817

Dated: October 31, 2013

I. PRELIMINARY STATEMENT

On August 28, 2012, the International Brotherhood of Electrical Workers Local 840 (the "Union") filed the Original Charge against Newark Electric Corp. ("NEC") and Colacino Industries, Inc. ("Colacino"). (GC Ex. 1a). The Original Charge alleged that NEC and Colacino: (i) violated Sections 8(a) (1) and (3) of the Act by terminating Anthony Blondell because of his concerted protected activity and membership in and support of the Union; and (2) violated Section 8(a) (5) of the Act by abnegating a collective bargaining agreement mid-term with the Union on June 20, 2012.

On October 25, 2012, the Union filed an Amended Charge against NEC, Colacino, and Newark Electric 2.0 ("NE 2.0") (GC Ex. 1c). The Amended Charge alleged that NEC, Colacino and NEC 2.0: (i) violated Sections 8(a) (1) and (3) of the Act by *laying off and/or constructively discharging* Anthony Blondell because of *the Employer's plan to work non-union*; and (2) violated Section 8(a) (5) of the Act by abnegating a collective bargaining agreement mid-term with the Union on *July 20*, 2012. (GC Ex. 1c) (changes in Amended Charge noted in italics).

On May 30, 2013, the Board, by its Acting General Counsel, filed a Complaint against Respondents NEC, Colacino and NEC 2.0 based on the allegations in the Amended Charge. (GC Ex. 1e). Respondents filed a timely Answer to the Complaint which was twice amended prior to the hearing. (GC Exs. 1g, 1h, and 1i). This matter was heard on August 26 and 27, 2013. At the outset of the hearing Respondents moved to dismiss the Complaint. (Tr. 11-12). The Administrative Law Judge reserved judgment on that motion, indicating that the ruling would be part of the decision. (Tr. 12). At the close of the hearing the Administrative Law Judge set

October 1, 2013 as the deadline for filing briefs. (Tr. 302). Based on the government shutdown, the ALJ notified the parties that the deadline for filing briefs was extended to November 1, 2013.

A. Colacino Industries, Inc.

Colacino Industries was formed in February 2000 by James Colacino, its President and 100% owner. (R. Ex. 3; Tr. 166, 238-39). Colacino's primary business is as an automation systems integrator providing high technology solutions, doing software development, software service and hosted software applications mainly for the water and wastewater, food industry, and manufacturing similar to what would be seen in a GM plant. (Tr. 166-67, 170). In the realm of its automation house and systems integration work Colacino does things such as building automation systems, high technology robotic welding systems, telemetry, SCADA (shorthand for "Supervisory Control And Data Acquisition," which is a type of industrial control monitoring system) and cloud computing. (Tr. 240). As a small percentage of its business Colacino also does traditional "pipe and wire" electrical contracting work. (Tr. 167, 170). Prior to 2011 Colacino was a non-union company.

B. Newark Electric 2.0

Newark Electric 2.0 was also formed by James Colacino, its President and 100% owner, on March 8, 2011. (GC Ex. 28; Tr. 167-69). NE 2.0 was formed as the result of a number of years of discussions between Mr. Colacino and Union Business Agent Mike Davis (detailed below) wherein Mr. Davis attempted to persuade and cajole Mr. Colacino into signing Colacino to an 8(f) Letter of Assent – A agreement with the Union (see, e.g., GC Ex. 4). Mr. Colacino specifically formed NE 2.0 with the purpose of segregating out the small percentage of Colacino's business that still performed all of the "pipe and wire" bargaining unit work covered by the Union's multi-employer agreements with the Finger Lakes Chapter of N.E.C.A. (Tr. 171;

GC Ex. 2, 3). Simultaneously with its formation, Mr. Colacino signed NE 2.0 to a Letter of Assent C with the Union effective February 24, 2011. (Tr. 179; GC Ex. 6).

C. **Newark Electric Corp.**

Newark Electric Corp. ("NEC") was formed in May 1979 and was at all times 100% wholly owned by Richard Colacino (James Colacino's father). (R. Ex. 5; Tr. 171-73, 283-85). While James Colacino worked for his father Richard at NEC in the 1970's, 1980's and 1990's, at no time was James Colacino ever an owner or officer of NEC or authorized to sign contracts and agreements binding NEC; he was simply an employee. (Tr. 171, 285). In 2000 Richard Colacino sold the assets, name and likeness, good will, and customer base of NEC to James Colacino for five-hundred thousand dollars ($500,000.00). (Tr. 172-73, 243-44, 285-86). After paying off a tax lien that prevented him from immediately dissolving the company, Richard Colacino was able to finally dissolved NEC on April 3, 2013. (GC Ex.; Tr. 174-75, 266-67, 287-88).

D. **Mike Davis Signs Up NE 2.0 and then Colacino**

Mike Davis relentlessly pestered, cajoled and used underhanded business tactics for over five years with the singular goal of pressuring Mr. Colacino into signing his company up with the Union. Mr. Davis successfully wore Mr. Colacino down to the point where Mr. Colacino capitulated and went to the time and expense of creating a new company, NE 2.0, in order to segregate the small amount of traditional electrician "pipe and wire" portion of work out of his business (Colacino Industries) and into that new company so that he could sign NE 2.0 to a Letter of Assent C with the Union. (Tr. 183, 246-53, 291-93). The evidence shows that the frequency of Mr. Davis' unwelcomed intrusions on Mr. Colacino and his business escalated over time and his tactics became increasingly aggressive. Mr. Davis stalked Mr. Colacino at his business for months; circling in the parking lot and parking and waiting as much as an hour and a

half or more for Mr. Colacino to show up so he could press him about signing Colacino Industries with the Union. (Tr. 291-92). Mr. Davis habitually barged into Mr. Colacino's place of business and walked past his staff to get to Mr. Colacino in his office in the back to badger him about signing with the Union. (Tr. 291-92). Mr. Davis inundated Mr. Colacino with calls, texts, and messages, including Facebook comments. (Tr. 248, 291-23). At one point, Mr. Davis provided Mr. Colacino with an electrician from the hiring hall, Tony Blondell, as a trial (and a salt) to show the benefits of Union affiliation. (Tr. 249-53). When Mr. Colacino would not agree to sign Colacino Industries up with the Union Mr. Davis ended that relationship and forced Mr. Blondell to come back to the hall; threatening to make Blondell pay $38,000 into the Union benefits funds if he did not (a threat that he apparently holds over Mr. Blondell's head to this day). (Tr. 249-53).[1] Mr. Davis also engaged in a campaign of economic blackmail against Mr. Colacino by hiring his employees away and then laying them off to both deprive him of his skilled workforce and cause Mr. Colacino significant unemployment expenses. (Tr. 253, 254).

Mr. Colacino explained over and over to Mr. Davis that he did not believe that the Union and the employees it could supply from the hiring hall were a good fit for the vast majority of his business. (Tr. 189). Undaunted, Mr. Davis continued and escalated his pressure tactics. Every time he cornered Mr. Colacino at his business he would have a Letters of Assent (A and/or C) ready for him to sign. (Tr. 182; see, e.g., R. Ex. 2). At his wits end because of Mr. Davis'

[1] This scenario was deliberately orchestrated by Mr. Davis. Mr. Blondell testified that when he went to work for Mr. Colacino it was as a Union subcontractor; Blondell Electric, LLC. (Tr. 152-53). Mr. Colacino testified that the first time he paid Mr. Blondell, he wrote a check to Mr. Blondell for his net pay, minus taxes, and wrote another check to the Union for Mr. Blondell's benefits. (Tr. 249, 251). Mr. Davis told Mr. Colacino not to do that and that he needed to pay everything to Mr. Blondell directly, (Tr. 249-50). Per Mr. Davis' instructions Mr. Colacino paid everything to Mr. Blondell as a non-union contractor, which gave Mr. Davis a way to essentially blackmail Mr. Blondell with the threat of forcing him to repay $38,000 into the Union benefits funds if he did not do what Mr. Davis told him to do. (Tr. 249-50).

unrelenting and escalating pressure tactics (e.g., stripping Mr. Colacino of all his pipe and wire technicians), Mr. Colacino ultimately capitulated and created NE 2.0 to sign the Letter of Assent C with the Union on February 24, 2011. (GC Ex. 6).

Mr. Davis' denial at the hearing the he knew Mr. Colacino was creating a new company to sign the Letter of Assent C was not credible. Although he claimed not to know anything about NE 2.0, he acknowledged getting payroll reports from NE 2.0 beginning in March 2011, right after NE 2.0 was formed and the Letter of Assent C was signed. (Tr. 28; GC Ex. 9). Based on the payroll reports he was receiving, Mr. Davis clearly knew of NE 2.0's existence. Moreover, Mr. Davis' testimony as to his knowledge of Mr. Colacino's companies was extraordinarily confused and flatly self-contradictory. Mr. Davis testified that he told Mr. Colacino that he could not create a Union company to go with his non-Union company and vehemently denied that's what was happening when "Newark Electric" (NE 2.0) signed the first Letter of Assent C with the Union. (Tr. 85-86). Mr. Davis then clumsily danced around the issue of NE 2.0 doing Union work under the Letter of Assent C and Colacino Industries not being signed up as a Union contractor. He first testified that the Union would not permit an employer to form a new company to sign with the Union and do Union work while the other company remained non-Union. (Tr. 86-88). Upon further questioning, however, he admitted that he knew that Mr. Colacino had two companies before he signed any Letters of Assent C, and that he believed Mr. Colacino to be the owner of Newark Electric and the owner of Colacino Industries. (Tr. 88-89). When then pressed as to why he permitted Mr. Colacino to sign only one of his two companies with the Union (which he had testified was not permissible) Mr. Davis made the following garbled and self-contradictory responses:

Q: *But you knew he had two companies, right?*
A: *Uh-huh.*
Q: *You just testified to that.*
A: *Right.*
Q: *So, he's going to, he's telling you –*
A: *Well, you're telling me that –*
Q: *-- he's going to sign up one of them.*
A: *I did not say that (a) one could remain this or one could remain that, that discussion never took place, so that's why I guess I'm having the issue of answering that. I didn't have that discussion.*
Q: *Well, you knew, you testified that you knew he had two companies.*
A: *Yeah.*
Q: *And on February 24 of 2011 he signed one of them up according –*
A: *Yep.*
Q: *-- to you?*
A: *Right.*
Q: *And you believe that company to be Newark Electric Corp.*
A: *That's correct.*
Q: ***So, at that point in time you didn't have any problem with him having a Union company and a non-union company.***
A: ***Correct.*** (Tr. 89-90)(emphasis supplied).

According to its terms, Mr. Colacino was unable to terminate the Letter of Assent C for the first 180 days; *viz.*, until August 22, 2011. (GC Ex. 6). It soon became clear, however, that keeping NE 2.0 as a separate company was economically and logistically unsustainable. As a startup company NE 2.0 did not have the necessary cash reserves to deal with the cash flow issues created by slow-paying customers and the need to meet payroll and other expenses. (Tr. 183-84). In addition, although Mr. Colacino had originally been informed by his insurance carrier that the insurance for NE 2.0 would be minimal, in reality his cost went up exponentially both because NE 2.0 was a new business and because Mr. Davis had stripped him of employees, monumentally increasing his historically nearly nonexistent unemployment insurance expenses. (Tr. 184). When Mr. Colacino brought those issues to Mr. Davis' attention, Mr. Davis proposed signing Colacino Industries to the Letter of Assent C. (Tr. 184).

When they talked about signing Colacino Industries to a Letter of Assent C, Mr. Davis told Mr. Colacino that a single person (Jim Colacino) could not have two Letters of Assent C with the Union. (Tr. 185). Mr. Davis told Mr. Colacino that they would have to dissolve or in some fashion make the Letter of Assent C with NE 2.0 go away to then have a single Letter of Assent C with Colacino Industries. (Tr. 185). The same day that Mr. Davis told Mr. Colacino this (July 20, 2011) Mr. Colacino agreed to sign, and then signed, Colacino Industries to a Letter of Assent C with the Union. (Tr. 185; GC Ex. 10). *Note: on July 20, 2011, when Mr. Colacino signed Colacino Industries to the Letter of Assent C he did not have the legal right to terminate NE 2.0's Letter of Assent C because they were still within the initial 180 day period when it could not be terminated by him.*

While Mr. Colacino could not terminate NE 2.0's Letter of Assent C on July 20, he had no reason to believe that the Union could not do so, and in fact was led to believe that it could based on Mr. Davis' assertions that a single person was not permitted to have more than one Letter of Assent C. (Tr. 185-88). Moreover, Mr. Davis also represented to Mr. Colacino just before he signed Colacino Industries to the Letter of Assent C that he would either do so or redate the NEC 2.0 Letter of Assent C to make it run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C. (Tr. 185-88). Mr. Davis later told Mr. Colacino that he had redated NE 2.0's Letter of Assent C to run concurrently with Colacino Industries' Letter of Assent C. (Tr. 186, 191-92).[2]

[2] The Union never provided Mr. Colacino with that redated Letter of Assent C. (Tr. 186, 192). In his own words, Mr. Colacino *"... had taken Mike [Mr. Davis] on his word that, one, you couldn't have two companies signatory, two letters of assent C with a single owner and that by his - his comment to me that he had re-dated that, I just went back to running the business. I never gave it another thought ..."* (Tr. 188).

The July 20, 2011 Letter of Assent C could not be terminated prior to January 15, 2012 (180 days after it was executed). That means that to the extent that the NE 2.0 Letter of Assent C still existed, it could not be terminated between August 22, 2011 and January 15, 2012 based on its original execution date. Although the 1 year anniversary of NE 2.0's original Letter of Assent C came and went on February 24, 2012, the Union never communicated to Mr. Colacino that NE 2.0 was at that point in any way still bound by the NE 2.0 Letter of Assent C. ***This lack of action by Mr. Davis and the Union is very telling, in that it was entirely consistent with Mr. Davis' representation to Mr. Colacino that NE 2.0's Letter of Assent C had either been dissolved or redated to July 20, 2011.***

After having given the Union a fair trial period to prove the economic benefits that Mr. Davis had promised, Mr. Colacino determined that it was simply not advantageous to continue having his company be a union signatory. In April 2012 Mr. Colacino instructed his CFO, Kevin Groff, to take the necessary steps to terminated Colacino Industries' Letter of Assent C with the Union. (Tr. 215-16). Letters terminating Colacino Industries' Letter of Assent C were sent to the Union and Finger Lakes NECA. (Tr. 216-17; GC Exs. 12, 33). Mr. Colacino did not send similar letters regarding NE 2.0's Letter of Assent C at that time because he believed that Mr. Davis had nullified the NE 2.0 Letter of Assent C, and even if it still existed NE 2.0 was no longer being used (it was essentially an empty shell) and the Union knew that. (Tr. 217-18). Significantly, Acting General Counsel failed to adduce any evidence that Finger Lakes NECA still thought that NE 2.0 was a signatory. Further, although Mr. Colacino clearly offered to discuss how the Union could support NE 2.0 in the aftermath of his terminating Colacino Industries' Letter of Assent C (telling the Union that he "... *would like to schedule a meeting with you [Mr. Davis] to discuss the reasons for this decision and how the IBEW can support*

NEC 2.0, Inc. .... Please call me at your earliest convenience to schedule a meeting." (GC Ex. 12, p. 1), the Union never responded. (Tr. 261).

When Mr. Colacino learned that the Union was taking the position that he was still a union signatory by virtue of NE 2.0's Letter of Assent C, he immediately directed Mr. Groff to terminate that purported Letter of Assent C just as he had done with Colacino Industries. (Tr. 218-20; GC Ex. 13).[3] NE 2.0's Letter of Assent C was terminated by letters dated June 29, 2012. (Tr. 221; GC Ex. 13). Significantly, the termination letter references "... *the letter of assent dated 7/20/11* ...". (GC Ex. 13)(emphasis supplied). This clearly reflects Mr. Davis' agreement with Mr. Colacino to redate NE 2.0's Letter of Assent C to run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C and his assurances to Mr. Colacino that he had in fact done so. Per the express and unequivocal terms of the Letter of Assent C, Mr. Colacino was legally able to terminate the Letter of Assent C, at any time after the initial 180 days and up to the 1 year anniversary of its signing. (GC Exs. 5, 6, 10). The only limitation is not on the ability to terminate the Letter of Assent C during that 180 – 1 year anniversary period, but rather the fact that the termination itself cannot become effective sooner than 30 days after the written

[3] Mr. Colacino testified that although he instructed Mr. Groff (who is no longer employed by Colacino) to send termination letters to both the Union and Finger Lakes NECA, he did not have a copy of the letter that would have gone to NECA terminating NE 2.0's Letter of Assent C. (Tr. 220-21). Clearly Acting General Counsel seeks to have the ALJ draw the conclusion that NE 2.0's Letter of Assent C was not properly terminated based on the absence in the record of a termination letter to NECA. Such a conclusion would be unjustified for a number of reasons. First, NECA is not a party to this proceeding and Acting General Counsel offered no evidence in the record that NECA has ever asserted that NE 2.0 or Colacino Industries are still bound to its agreements with the Union (GC Exs. 2, 3). Second, Acting General Counsel could have subpoenaed a NECA representative to testify and/or produce documents relating to Colacino Industries and NE 2.0 and failed to so or request an adjournment to do so after reviewing the copious records it subpoenaed from Colacino and determining that Colacino did not have a copy of the letter to NECA. Third, based on Acting General Counsel's failure to call such a witness Mr. Colacino's uncontradicted testimony that letters were sent to both the Union and NECA terminating NE 2.0's Letter of Assent C must be credited.

notice terminating the Letter of Assent C. Thus, as Mr. Colacino testified, although his termination letters for NE 2.0 state that the agreement was terminated as of the date of the letter (June 29, 2012) in actuality the effective termination date would have been July 29th. (Tr. 221-22). Mr. Colacino also immediately started the process of officially dissolving NE 2.0 in July 2012 (in actuality it had been an empty shell since the time Mr. Colacino signed Colacino Industries to a Letter of Assent C with the Union in July 2011), which process was completed in November 2012. (R Ex. 4; Tr. 241-43).

E. Anthony Blondell's Separation

Mr. Blondell testified that Mr. Colacino never told him to quit the Union; he simply told Mr. Blondell of his plan to terminate the Letter of Assent C with the Union. (Tr. 148). At Mr. Blondell's specific request Mr. Colacino separated him from the company and gave him a letter stating that he was being laid off for lack of work. (Tr. 228, 276; GC Ex. 23). Scott Barra, a former Union member who had been the Union's Vice-President and a member of its Executive Board, testified that both Colacino Industries' employees and the Union and Mr. Davis knew that Mr. Colacino had a year to terminate the Letter of Assent C, and that July 20 was the date by which the Union acknowledged internally he had to do so. (Tr. 273-75). Mr. Barra testified that he was present when Mr. Blondell told Mr. Colacino that he was not going to leave the Union but did not want the Union to be able to say that Colacino was still in the Union because he as a Union member continued to work for Colacino after the July 20 date. (Tr. 278). Mr. Barra testified that Mr. Blondell told Mr. Colacino that "… if you just lay me off for lack of work, then they [the Union] can't use me as a tool to tell you that you're still in the union cause I work for you." (Tr. 278).

Mr. Blondell testified that at the time he was laid off they had not finished the jobs he was working on and that there was work for him. (Tr. 146-47). The ALJ asked Mr. Blondell what was discussed in a conversation referenced in his layoff letter between Mr. Blondell and Mr. Colacino earlier in the day. (Tr. 145-46; GC Ex. 23). Mr. Blondell was somewhat opaque in his response to the ALJ, stating *"That it was probably going to be my, you know, it was going to be my last day but we both knew that from prior days."* (Tr. 145). When the ALJ followed up by asking whether Mr. Colacino told him why, Mr. Blondell responded: *"No, because I mean we both knew the reason I was leaving, it was because of, I know I keep going back to the date July 20th, but July 20 was the last day that as me being a Union employee. It was the last day I was going to work there."* (Tr. 145). When asked by the ALJ whether he questioned the statement in the letter that he was being laid off because of a lack of work Mr. Blondell responded: *"No, I didn't. .... I guess it don't matter to me at the time. I didn't, I wasn't, I mean I read it and just, I didn't, whether it was lack of work for a Union employee, I mean I didn't really, I didn't look into it deep or nothing."* (Tr. 146).

Mr. Colacino testified that Mr. Blondell was a good employee and that he wanted to retain him. (Tr. 227-29). This is consistent with the language of Mr. Colacino's letter, in which he states: *"Your employment here was sincerely appreciated and you are considered to be among the best in the trade. That said, I hope the future holds opportunities for us to work together again."* (GC Ex. 23). Mr. Colacino testified that: *"... So it was with incredible regret to even write that letter, but I did it on his insistence, because he inferred and insinuated that the union was going to use that as a tool against me if I didn't lay him off for lack of work."* (Tr. 229) (emphasis supplied). In fact, Mr. Colacino told Mr. Blondell that he didn't have a lack of work, but Mr. Blondell insisted that Mr. Colacino had to lay him off to protect his business. (Tr.

229). At the time he was speaking with Mr. Blondell Mr. Colacino did not understand that it was Mr. Blondell, not he or his company, that would get into trouble if Mr. Blondell stayed in the Union and continued to work for Mr. Colacino. (Tr. 229).

Acting General Counsel failed to adduce any proof that Mr. Colacino ever planned to change Mr. Blondell's compensation after Colacino Industries reverted to its non-union status. In fact, the *status quo ante* would have been as it was before Mr. Colacino signed the first Letter of Assent C, when Mr. Blondell was in the Union and working for Mr. Colacino as a Union subcontractor and Mr. Colacino paid his wages and Union benefits, either to the Union and Mr. Blondell by separate checks or all to Mr. Blondell as Mr. Davis insisted, with Mr. Blondell to then make the appropriate payments to the Union for his dues and benefits. (see, footnote 1). In sum, the evidence in the record shows that Mr. Colacino never told Mr. Blondell that he had to quit the Union to stay employed and no proof was adduced to show that Mr. Blondell could not have returned to his status of working for Colacino as a Union subcontractor or that his pay or benefits would have changed if he had elected to remain employed by Colacino rather than asking Mr. Colacino to lay him off.

II. ARGUMENT

A. THE COMPLAINT MUST BE DISMISSED ON JURISDICTIONAL GROUNDS.

The *sine qua non* of any NLRB proceeding is that "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice *the Board*, or any agent or agency designated by the Board for such purposes, *shall have power to issue and cause to be served upon such a person a complaint* stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, ..." (29 U.S.C. §160(b) (emphasis supplied). The Board is at all times required to maintain a

quorum of three of its five members. 29 U.S.C. §153 (b); New Process Steel, L.P. v NLRB, 130 S. Ct. 2635, 2645 (2010). "It is undisputed that the Board must have a quorum of three in order to take action." Noel Canning v. NLRB, 705 F.3d 490, 499 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24 2013). Thus, Respondents submit that the Complaint must be dismissed because at the time the Complaint was filed, the NLRB did not have a quorum and could not, therefore, exercise the power of the Board in filing Complaints or taking any other actions.

The Complaint was filed on May 30, 2013. (GC Ex. 1e). When the Complaint was filed, the Board consisted of Chair Mark Pearce and Members Sharon Block and Richard Griffin. Members Block and Griffin were appointed as recess appointments by President Obama on January 4, 2012, and sworn in on January 9, 2012.[4] It is submitted that, for the reasons set forth in Noel Canning, Members Block and Griffin were invalidly appointed because they were appointed during an intrasession break, and not an intersession break, as the law requires for valid Recess appointments. Thus, when the Complaint was issued in May 2013 the Board lacked a quorum, having only one validly appointed Member, and its actions were, consequently, void *ab initio*. See also, NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4th Cir. 2013); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013). Accordingly, since the Board lacked a quorum in May 2013, and therefore any power to act, the Complaint must be dismissed.

As an alternate basis for dismissal Respondents submit that the Complaint must also be dismissed because it was initiated without a validly appointed General Counsel or Acting General Counsel. See, Hooks v. Kitsap Tenant Support Svcs. Inc., 2013 U.S. Dist. LEXIS 114320, 196 L.R.R.M. (BNA) 2703 (W.D. Wash. Aug. 13, 2013) (Decision in the Record as R.

[4] Terence Flynn was also appointed and sworn in on these dates but subsequently resigned in July 2012 before the Complaint at bar was issued.

Ex. 1). This Complaint (GC Ex. 1e) was issued pursuant to the authority of Acting General Counsel Lafe Solomon ("ACG Solomon"). If, as Respondents assert, Mr. Solomon was never validly appointed to the position of Acting General Counsel, then the issuance of the Complaint at bar was an *ultra vires* act, and the Complaint must be dismissed as a matter of law.

The National Labor Relations Act establishes the procedure for the appointment of the NLRB's General Counsel and, if necessary, it's Acting General Counsel, and the singular authority of General Counsel with regard to the investigation and issuance of complaints:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners [administrative law judges] and legal assistants to Board members) and over the officers and employees in the regional offices. *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10* [29 USCS § 160], *and in respect of the prosecution of such complaints before the Board*, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, *but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* 29 U.S.C. 153(d) (italics added).

President Obama nominated Mr. Solomon to serve as Acting General Counsel of the NLRB on June 21, 2010, which was during the second session of the 111th Congress.[5] The second session of the 111th Congress ran from January 5, 2010, through December 22, 2010.[6]

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[5] See, NLRB website: http://www.nlrb.gov/who-we-are/general-counsel/lafe-solomon-acting-general-counsel

[6] See, U.S. Senate website: http://www.senate.gov/reference/Sessions/sessionDates.htm

President Obama subsequently nominated Mr. Solomon to be the General Counsel of the NLRB on January 5, 2011, which was the first day of the first session of the 112th Congress.[7] The Senate did not confirm Mr. Solomon's appointment. The first session of the 112th Congress ended on January 3, 2012, and President Obama did not nominate another General Counsel or Acting General Counsel prior to the issuance of the Complaint at bar.

During the relevant time period Mr. Solomon purported to be the Acting General Counsel. He was, however, only appointed Acting General Counsel during the 111th Congress, which ended on December 22, 2010, and President Obama never made an official nomination to the General Counsel position until after the expiration of the 111th Congress. Moreover, the Senate never confirmed Mr. Solomon's nomination as General Counsel during the 112th Congress, nor did President Obama make another nomination prior to the issuance of this Complaint. Accordingly, it is submitted that under the clear and unambiguous mandate of 29 U.S.C. § 153(d), Mr. Solomon was Acting Attorney General for only 40 days (which tenure expired on July 31, 2010), or, at the very latest, December 22, 2010 (the adjournment *sine die* of the 111th Congress). The original Charge was filed August 28, 2012, and the Complaint issued on May 30, 2013. (GC Ex. 1[a] and [e]). Since Mr. Solomon was never validly appointed as the Acting General Counsel, both the investigation *and* issuance of the Complaint in the matter were *ultra vires* acts.

In the Kitsap case, supra, the Board argued that ACG Solomon was validly appointed pursuant to the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 et seq., and therefore

[7] See, Congretional Record website: http://www.gpo.gov/fdsys/pkg/CREC-2011-01-05/html/CREC-2011-01-05-pt1-PgD1.htm

ACG Solomon's delegation of authority to file the Complaint against Kitsap was a valid act. As noted by the Kitsap court, however:

> The FVRA only permits the appointment of a person under specific circumstances and the only circumstance that could apply to Hooks is appointing a person who, within the last 365 days, has served as a personal assistant to the departing officer Id. § 3345(b). It is undisputed that Solomon has never served as a first assistant. Therefore, Hook's argument is without merit. (R. Ex. 1, pp. 3-4).

Based on the fact that AGC Solomon was never validly appointed to the Acting General Counsel position, it is submitted that the ALJ should grant Respondents' motion and dismiss the Complaint in its entirety.

B. NEWARK ELECTRIC CORPORATION DOES NOT STAND IN A SINGLE EMPLOYER/ALTER EGO RELATIONSHIP WITH EITHER COLACINO INDUSTRIES OR NEWARK ELECTRIC 2.0.

The Board examines four factors to determine whether two nominally separate employing entities constitute a single employer. Those factors are: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. Carr Finishing Specialties, Inc., 358 NLRB No. 165 (2012). With regard to alter ego status, the Board looks at additional factors including whether the entities are substantially identical based on their management, business purpose, operating equipment, customers, supervision and common ownership. Id. It has been stipulated for purposes of this case that Colacino Industries and NE 2.0 had a single employer/alter ego relationship based on the four factors above. The remaining question is whether there was a single employer/alter ego relationship between Colacino Industries and Newark Electric Corp. ("NEC").

Colacino and NEC do not satisfy any of the criteria used to measure single employer/alter ego status. At all times each entity was 100% owned and controlled by different individuals;

Colacino by James Colacino and NEC by Richard Colacino. While NEC was a dormant company from 2000 until its dissolution in April 2013, the evidence shows that there was never any common management of the two companies. Colacino has at all times been managed by James Colacino while NEC was always managed by Richard Colacino. More to the point, there was never any interrelation of operations or common control of labor relations, inasmuch as Colacino was formed in 2000 and NEC went completely dormant in 2000 when Richard sold all of the assets, good will, and customer list to James Colacino for $500,000. The only reason NEC was not completely dissolved in 2000 is that Richard Colacino had to finish paying off a tax lien against that company. When that tax lien was paid off NEC was promptly dissolved in 2013. Otherwise, NEC was completely defunct as of 2000. The fact that Richard Colacino went to work for his son at Colacino Industries after 2000 is further proof that NEC was no longer doing any business after its assets, good will and customer base were sold to Colacino. If NEC had continued to be an active and ongoing business then Richard Colacino would have devoted his time and labors to that business and would not have worked at Colacino Industries. Thus, if the relationship of NEC and Colacino Industries were to be depicted by a Venn diagram, they would appear as two circles that never intersect – a null set if you will.

Although the Board's alter ego inquiry is somewhat broader in scope, the result is the same. In the vernacular, an alter ego is defined as a "second self" or another aspect of one's self. Both the vernacular and the Board's definition are premised, however, on the active existence of both entities at the point in time when the question of alter ego status is being determined. If Colacino and NEC had been actively engaged in business at the same time, then Acting General Counsel's proof regarding such things as names on invoices, markings of company vehicles, place of business, phones, e-mail addresses, etc. (E.g., GC Exs. 7, 19, 24-27, 29-32, 34) might

lead one to the conclusion that these two companies were indeed alter egos. The missing link, the absent crucial underpinning if you will, is any evidence that these two companies were actively engaged in business at the same time within the relevant timeframe. They were not.

The unrefuted evidence in the record establishes that neither company ever had common management. While James Colacino worked for Richard Colacino at NEC prior to forming his own company and Richard Colacino works for James Colacino at Colacino Industries, neither ever had any management role in the other's company. It is utterly meaningless to say that NEC and Colacino are substantially identical when the evidence shows that for all practical purposes they never existed contemporaneously as business entities. The fact that Colacino used NEC's name, assets, and customer base is wholly attributable to the fact that it purchased them in 2000 when NEC ceased operating as an active business. Certainly NEC did not have the same business purpose as Colacino *since it had no business purpose whatsoever on and after 2000.* NEC also had no operating equipment, customers, or employees since 2000. All NEC retained after 2000 was a tax lien that had to be discharged before it could be finally dissolved. Thus, Colacino and NEC cannot be considered to be alter egos under Board law (or any other law for that matter).

C. THERE WAS NO ENFORCEABLE LETTER OF ASSENT C AGREEMENT BETWEEN NE 2.0 AND THE UNION.

It was stipulated that Colacino Industries properly and timely terminated its Letter of Assent C with the Union. (Tr. 83). It is also uncontested that NE 2.0 was dissolved and no longer exists. Thus, the only possible enforceable Letter of Assent C that exists in this case is the one between the Union and the company named Newark Electric; *not NE 2.0.* (GC Ex. 6). In fact, the Board attorney representing Acting General Counsel vehemently asserted just that during her opening: *"... the evidence will show that Newark Electric is alive and well as the face*

of Colacino Industries. Respondent may also argue that the letter of assent as signed on February 2011 was an agreement between Newark Electric 2.0 and the Union, but the document speaks otherwise." (Tr. 10).[8] While Colacino may be alive and well, the evidence adduced at the hearing shows that NEC was, at best, in a catatonic or Zombie-like state from 2000 – 2013, when it was finally put to complete rest.

While James Colacino signed the February 24, 2011 Letter of Assent C, it is indisputable that he never had any ownership interest in NEC, was never an officer of NEC, and never had any authority to bind NEC to any agreements. Moreover, this Letter of Assent C, which was drafted by the Union, has NEC's Federal Employer Identification Number ("FEIN"), not that of NE 2.0, which did not even have an FEIN at when this agreement was signed. (Tr. 80-81; GC Ex. 9, at p. 4. [showing FEIN for NE 2.0] and GC Ex. 11[showing FEIN for Colacino]). That being the case, it is submitted that the only reason that Acting General Counsel has alleged and tried to prove that Colacino and NEC constituted a single employer/alter ego is that absent such a finding there is no proof that NE 2.0 ever entered into a legally binding Letter of Assent C with the Union. The entire case would rest, then, on the Letter of Assent C signed by Colacino Industries, which was properly and legally terminated by Mr. Colacino in April 2012.

If it is to be believed, then the testimony of Acting General Counsel's witness, Union Business Agent Mike Davis, fatally undercuts the allegation that there was an enforceable Letter

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[8] If in fact Newark Electric [NEC] and Colacino Industries were one in the same entity, then query why the Union would ever have had Colacino Industries sign the second Letter of Assent C in July 2011. There would have been no need to do so, since under the Union's and Acting General Counsel's theory it already had Colacino Industries signed up with an anniversary clock that began in February 2011. It would make no business sense from the Union's perspective to extend the 1 year anniversary of the Letter of Assent C, and by extension, Mr. Colacino's time to opt out of that agreement. ***Moreover, if they were one in the same entity, then the first Letter of Assent C should have merged into the second Letter of Assent C, which Acting General Counsel has stipulated was properly and legally terminated by Mr. Colacino in April 2012.***

of Assent C between the Union and NE 2.0. Mr. Davis steadfastly maintained throughout his testimony that he never knew NE 2.0 existed. (Tr. 32, 83-84). If one takes Mr. Davis at his word, and his further testimony that the Letter of Assent C *he prepared* was to be between the Union and the existing company, Newark Electric (NEC), then that Letter of Assent C is legally unenforceable and a nullity on its face, since it was not signed by an officer or owner of NEC, which was still legally in existence at that point in time. The only individual who could have signed NEC to the Letter of Assent C was its 100% owner and President, Richard Colacino; and he did not do so.

What is sauce for the goose is sauce for the gander. If Acting General Counsel and the Union are attempting to hold Colacino to the absolute letter of that Letter of Assent C agreement by stating that it was between the Union and NEC - *not NE 2.0* - and maintaining that it was not timely and effectively terminated by James Colacino, then they must, as a matter of legal imperative and intellectual honesty, also concede that this Letter of Assent C was void *ab initio*, and therefore completely unenforceable, since it was never entered into by anyone with authority to bind Newark Electric (NEC). The only way for Acting General Counsel to cut this logical and legal Gordian Knot and salvage this portion of the Complaint is through creative use of the single employer/alter ego theory to tie Colacino and NEC together. As noted in Point B above, however, Colacino and NEC cannot be considered single employers/alter egos. Consequently, it is submitted that the portion of the Complaint alleging that the Respondents have failed and refused to bargain collectively with the Union must be dismissed.

D. COLACINO AND NE 2.0 EFFECTIVELY TERMINATED THE LETTERS OF ASSENT C WITH THE UNION.

As noted above, Acting General Counsel stipulated that Colacino effectively terminated its Letter of Assent C with the Union, and thus there is no basis for finding that Colacino itself

currently has any legal relationship with the Union. If, contrary to the express terms of the document itself, it is found that the February 24, 2011 Letter of Assent C with "Newark Electric" (GC Ex. 6) was in fact legally binding on NE 2.0, as opposed to NEC (see, Point C, supra), then it is submitted as an alternative basis for dismissing the Complaint that this Letter of Assent C was also effectively properly terminated prior to its 1 year anniversary.

As noted above, Mr. Colacino's agreement to sign Colacino Industries to a Letter of Assent C in July 2011 was premised and based on Mr. Davis' representations to Mr. Colacino that one individual could not have two Letters of Assent C, and that the Letter of Assent C with Newark Electric would have to dissolve or go away so that there was only a single Letter of Assent C. (Tr. 185). While Mr. Colacino could not terminate NE 2.0's Letter of Assent C on July 20 (the earliest it could have been terminated was August 22), he had no reason to believe that the Union could not do so, particularly in view of Mr. Davis' assertions that a single person was not permitted to have more than one Letter of Assent C. (Tr. 185-88). After all, it was the Union's agreement and the Union's rules. Further, subsequent to his signing Colacino Industries to the Letter of Assent C he was told by Mr. Davis that the Newark Electric Letter of Assent C had been redated to make it run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C. (Tr. 185-88, 191-92). In this vein Mr. Davis' conduct becomes extremely important; for it demonstrates beyond cavil that, contrary to his testimony at the hearing, in fact NE 2.0's Letter of Assent C was either dissolved or effectively redated to July 20, 2011.

Union members Messrs. Blondell and Barra testified that they and the Union knew that July 20, 2012 was the deadline by which Mr. Colacino had to terminate the Letter of Assent C and get out of the Union. (Tr. 111-12, 138, 273-76). Mr. Colacino had previously terminated the second letter of Assent C with Colacino Industries in April 2012, and so the only Letter of

Assent C to which Messrs. Blondell and Bara could possibly have been referring was the original redated Letter of Assent C between NE 2.0 and the Union. In this case actions speak louder than words, and Mr. Davis' expression to his Union members that July 20 was Mr. Colacino's last day to get out of the Union operates as a recognition; nay an admission, that he had agreed with Mr. Colacino to redate NE 2.0's Letter of Assent C to July 20, 2012 so that it ran concurrently with Colacino Industries' Letter of Assent C. Otherwise, Mr. Davis would not have told Mr. Barra that he could not work for Mr. Colacino after July 20, and that he was pulling all the Union employees as soon as he heard that Mr. Colacino was going non-union because Mr. Colacino would already have been locked into a longer term relationship with the Union by virtue of the fact that NE 2.0's 1 year anniversary originally ended back in February 2012; before Mr. Colacino terminated Colacino Industries' Letter of Assent C with the Union. (Tr. 273-74). Mr. Davis would never have told his Union members this unless he had in fact either dissolved or redated NE 2.0's Letter of Assent C. Critically, although Mr. Davis was recalled as a rebuttal witness after Mr. Barra testified, he did not refute any of Mr. Barra's or Mr. Blondell's testimony. Thus, the fact that Mr. Davis told his Union members that Mr. Colacino had until July 20, 2012 to terminate his Letter of Assent C (and that if he did so they would be pulled from working for Colacino) bespeaks the truth of what Mr. Colacino testified to; *viz.*, that Mr. Davis agreed, as part of signing Colacino Industries to a Letter of Assent C, to either dissolve or redate NE 2.0's Letter of Assent C.

The allegations in the Amended Charge also clearly demonstrate that Mr. Davis understood the anniversary date of the first NE 2.0 Letter of Assent C to have been redated to July 20. The Amended Charge alleges that Respondents violated the Act by "... abnegating a collective bargaining agreement mid-term with the Union on *July 20*, 2012." (GC Ex.

1c)(emphasis supplied). Mr. Colacino's termination letter was dated June 29, 2012, and states that NE 2.0's Letter of Assent C was being terminated *that day*. (GC Ex. 13). While Mr. Colacino admitted to being incorrect about the effective termination date (the 30-day notice period would have taken that date out to July 29, 2012) the only way a reference in the Union's Amended Charge to a July 20 date would make any sense would be if, as Mike Davis told Mr. Colacino, he had redated NE 2.0's Letter of Assent C to July 20, 2011 to run concurrently with the Colacino Industries' Letter of Assent C.

Just as Mr. Davis had manipulated Mr. Blondell into a position where he allegedly owed the Union $38,000 in benefit contributions, and thus was able to exert control over him, the evidence similarly shows that Mr. Davis also manipulated and deceived Mr. Colacino, to Mr. Colacino's detriment, with respect to the status of the February 24, 2011 Letter of Assent C with NE 2.0. Significantly, since the trial period specified in the Letter of Assent C during which Mr. Colacino was able to terminate the agreement was for a period of up to 1 year, the Statue of Frauds does not require the agreement to redate the Letter of Assent C to be in writing. See, New York General Obligations Law §5-701 (a)(1). Thus, an oral agreement, or, as in this case, the oral modification of a written agreement (Mr. Davis' agreement to redate the February 2011 NE 2.0 Letter of Assent C to run concurrently with the July 2011 Colacino Letter of Assent C), is fully enforceable, since it was to be performed within 1 year. Moreover, there was ample consideration for the oral modification inasmuch as Mr. Colacino relinquished a legal right by pushing out from August 22, 2011, to January 2012 his ability to terminate NE 2.0's Letter of Assent C. (Tr. 186-87 *"I do know that when he mentioned that he had redated it, I [Mr. Colacino] was a little bit discouraged because I had assumed that one was going to come and go in its own time frame and, now, it basically extended that trial period, this letter of assent C, by*

four months."). Thus, Mr. Colacino was fully within his legal rights to terminate the NE 2.0 Letter of Assent C in June 2012, prior to its redated July 20, 2012, 1 year anniversary.

Even if Mr. Davis' oral agreement to redate the February 24, 2011 Letter of Assent C with Newark Electric (or NE 2.0) was not enforceable as a matter of law, Mr. Davis would still be legally prevented from challenging Mr. Colacino's termination of that agreement in June 2012 based on the doctrines of detrimental reliance, equitable estoppel, and/or unclean hands. Equitable estoppel prevents a party from disputing certain facts after it has obtained a benefit by causing the other party to reasonably rely on the truth of those facts. See, e.g., Manitowoc Ice, Inc. 344 NLRB 1222, 1223 (2005); Red Coats, Inc., 328 NLRB 205, 206 (1999). It is clear that when Mr. Colacino signed the Letter of Assent C in July 2011 he wanted and intended only Colacino Industries to be bound by an agreement with the Union. Mr. Davis knew that all Mr. Colacino had to do if he wanted to completely end his relationship with the Union was wait a few weeks until August 22, 2011, at which time Mr. Colacino would be beyond the initial 180 day period during which he could not terminate NE 2.0's Letter of Assent C with no further consequences or liability to the Union. To his credit, Mr. Colacino told Mr. Davis that the reason it could not work out with NE 2.0 was because of the cash flow and other issues that this startup company was having. Mr. Colacino expressed a willingness to prolong the trial period for another 6 months by signing Colacino Industries to a new Letter of Assent C to see if the relationship could work with his established company. Since Mr. Colacino did not have the right in July 2011 to unilaterally terminate NE 2.0's Letter of Assent C with the Union, he relied on Mr. Davis' representations that the Letter of Assent C with NE 2.0 was either dissolved or redated (leaving it to Mr. Davis to decide which based on his internal Union rules), with the result being Mr. Colacino forewent taking any action to terminate NE 2.0's Letter of Assent C

within the original 1 year anniversary period (*viz.*, on or before February 24, 2012) because he had been materially mislead by Mr. Davis as to the status of that Letter of Assent C. Accordingly, it is submitted that the Union and Acting General Counsel should be estopped from claiming that Mr. Colacino did not timely terminate NE 2.0's Letter of Assent C in June 2012, prior to its redated 1 year anniversary.

In addition to the foregoing, the doctrines of fraud in the execution and/or fraud in the inducement also operate in this case to prevent the Union and Acting General Counsel from claiming that Mr. Colacino did not properly terminated NE 2.0's Letter of Assent C in June 2012. "Both fraud in the execution and fraud in the inducement require a finding that the Employer was in fact misled about what was being signed, and that the Employer relied on that misrepresentation when signing the document." Horizon Group of New England, JD(NY) 43-05 (2004); see, Positive Electrical Enterprises, Inc., 345 NLRB 915 (2005). When Mr. Colacino signed the second Letter of Assent C binding Colacino Industries on July 20, 2011, he did so having been misled by Mr. Davis as to what effect signing Colacino Industries to that second Letter of Assent C would have on NE 2.0's first Letter of Assent C. By his prior conduct (*viz.*, his personal and electronic near-stalking activities, his economic warfare vis-à-vis hiring his employees away and then laying them off, which both depleted his workforce and caused him significant economic costs in the form of paying unemployment benefits that he had never had to pay before, etc.), Mr. Davis had essentially bullied Mr. Colacino into signing that first Letter of Assent C and conditioned him to go along with whatever Mr. Davis stated concerning the Union's Letters of Assent C (again, the Union's agreement; the Union's rules). Thus, Mr. Colacino was both misled by Mr. Davis concerning the legal status of NE 2.0's Letter of Assent

C when he agreed to sign the second Letter of Assent C for Colacino Industries, and he plainly relied on Mr. Davis' statements to his detriment when he signed that agreement.

As noted above, the only limitation on the ability to terminate the Letter of Assent C between the 180 day and 1 year anniversary period timeframe is that the termination itself cannot become effective sooner than 30 days after the written notice terminating the Letter of Assent C. Thus, as Mr. Colacino testified, although his termination letters for NE 2.0 state that the agreement was terminated as of the date of the letter (June 29, 2012) in actuality the effective termination date would have been July 29th. (Tr. 221-22). Practically speaking this failure to give the full 30 days' notice was of no significance, since NE 2.0 had not had any employees since July 2011 when Colacino Industries signed its Letter of Assent C (and therefore, *a fortiori*, did not do any bargaining unit work requiring the remittance of any payments to the Union or its funds) and was soon to be dissolved by Mr. Colacino. Business Agent Mike Davis agreed, testifying that if NE 2.0's Letter of Assent C were redated to July 20, then he would not any objection to the timing of Mr. Colacino's June 29, 2012 termination letter. (Tr. 96). Accordingly, it is submitted that both Letters of Assent C were legally and properly terminated and that the portion of the Complaint alleging that the Respondents have failed and refused to bargain collectively with the Union must be dismissed.

E. COLACINO DID NOT CONDITION THE EMPLOYMENT OF ANTHONY BLONDELL ON WORKING FOR A NON-UNION COMPANY, THEREBY CAUSING HIS TERMINATION.

As this portion of the Complaint alleges a violation of Section 8(a)(1) and (3) of the Act, Acting General Counsel was required to show discrimination with a motive of encouraging or discouraging union membership. Lively Electric, Inc., 316 NLRB 471, 472 (1995). The discriminatory motive element derives from the "Hobson's choice" of an employee being forced

to decide between losing his job and giving up his right to be in the union. Id. That credible evidence shows that this did not happen in this case.

The credible evidence in the record shows that Anthony Blondell engaged in what the military would call an "SIE" (self-initiated elimination). Mr. Colacino testified that Mr. Blondell was a good employee, he had work for him, and had no intention of laying him off. Indeed, had Mr. Colacino wanted to rid himself of Mr. Blondell for discriminatory reasons he would never have agreed to rescind Mr. Blondell's June 29, 2012 termination. (GC Exs. 21 and 22). Both Messrs. Colacino and Barra testified that Mr. Blondell went to Mr. Colacino and that Blondell told Mr. Colacino that he needed to lay Mr. Blondell off for lack of work by July 20, 2012, the anniversary date of the Letters of Assent C that had been terminated. Hence, Mr. Blondell was the quintessential SIE.

Mr. Blondell admitted that Mr. Colacino never told him to quit the Union. (Tr. 148). Moreover, it was clearly left up to the employees in the Union (Messrs. Blondell, Barra, and Bush) to decide what they wanted to do when Mr. Colacino terminated the Letters of Assent C with the Union. Scott Barra testified that Mr. Colacino had nothing to do with his decision process to: (1) either stay employed at Colacino or not; or (2) to remain a Union member or not. (Tr. 275). On the other hand, Business Agent Mike Davis specifically told Mr. Barra that they [the Union members employed by Colacino] could not stay members of the Union and continue to work for Colacino after July 20.[9] (Tr. 274). Mr. Davis told them that if Mr. Colacino went non-Union he would pull them all back from Colacino. (Tr. 274). Although Mr. Barra was aware that Mr. Davis had permitted other Union members go to a non-active status and work for

[9] This is also further proof that Mr. Davis redated NE 2.0's Letter of Assent C to run concurrently with Colacino's Letter of Assent C which had a 1 year anniversary end date of July 20.

a non-Union employer, Mr. Davis refused Mr. Barra's request to go to non-active status so that he could remain employed by Colacino. (Tr. 274). Mr. Barra also testified that had he elected not to resign his Union membership and had continued after July 20 to work for Colacino the Union would have brought him up on charges.[10] (Tr. 274). In the end, Messrs. Barra and Bush chose to resign from the Union and continue working for Mr. Colacino (GC Exs. 16 and 17) while Mr. Blondell, based on his much longer membership in the Union and its pension plan, decided to approach Mr. Colacino and ask Mr. Colacino to be laid off.

Clearly Mr. Colacino never conditioned Mr. Blondell's employment on quitting the Union or in any way caused Mr. Blondell to terminate his employment. Mr. Colacino would happily have employed Mr. Blondell as a non-Union company just as he did prior to signing Colacino Industries to a Letter of Assent C with the Union. Thus, the separation letter Mr. Colacino wrote at Mr. Blondell's behest plainly bespeaks an employer that did not want to lose Mr. Blondell as an employee; *viz.*, *"Your employment here was sincerely appreciated and you are considered to be among the best in the trade. That said, I hope the future holds opportunities for us to work together again."* (GC Ex. 23). Accordingly, it is submitted that the portion of the Complaint alleging that the Respondents conditioned Mr. Blondell's employment on working for a non-Union company must be dismissed. Mr. Colacino never placed any conditions whatsoever on Mr. Blondell's employment. The evidence conclusively establishes that Mr. Blondell was an SIE based on his own personal reasons.

[10] Mr. Blondell steadfastly denied knowing whether the Union could bring him up on charges or otherwise discipline him if he continued to work for Colacino after July 20 and was still a member of the Union. (Tr. 147). Consequently, from Mr. Blondell's perspective, based on his testimony, there was seemingly nothing preventing him from remaining a Union member and working for Colacino after July 20; just has he had done before Mr. Colacino signed the first Letter of Assent C in February 2011.

III. CONCLUSION

For the foregoing reasons Colacino respectfully requests that the Complaint be dismissed in its entirety.

Dated: October 31, 2013
Pittsford, New York

Respectfully submitted,

HARRIS BEACH PLLC

By: _____

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NEWARK ELECTRIC CORP.,
NEWARK ELECTRIC 2.0, INC.,
AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and **Case No. 3-CA-088127**

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 840

STATEMENT OF SERVICE

I, ANGELA CLARKE, the Legal Administrative Assistant to one of the attorneys for the Respondents, hereby certify that I caused a true and complete copy of the Respondents' Post-Hearing Brief to be served, by causing same to be enclosed properly and securely in a sealed wrapper to be delivered via regular mail through the United States Postal Service on the 31st day of October, 2013, from the office of Harris Beach, PLLC to:

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January 30, 2014

VIA Federal Express
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street NW
Washington, DC 20570

Re: Newark Electric Corp., et. al
Case No.: 03-CA-088127

To Whom it May Concern:

Enclosed are 8 copies of Respondents' Exceptions to the Decision of the Administrative Law Judge along with a Brief in Support of Exceptions to the Decision of the Administrative Law Judge in this matter.

As the certificate of service indicates, copies have been served on the other parties.

Very truly yours,

HARRIS BEACH PLLC

Edward A. Trevvett/ac

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cc: Rhonda P. Ley
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWARK ELECTRIC CORP.,
NEWARK ELECTRIC 2.0, INC.,
AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and

Case Nos. 03-CA-088127

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 840

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

HARRIS BEACH PLLC

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Dated: January 30, 2014

Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, Respondents Newark Electric Corp. ("NEC"), Newark Electric 2.0, Inc. ("NEC 2.0") and Colacino Industries, Inc. ("Colacino") hereby file the following Exceptions to the Decision of Administrative Law Kenneth W. Chu (JD[NY]-03-14) dated January 6, 2014 ("ALJD"). Respondents except to certain findings of fact, credibility determinations and conclusions of law, and except to the failure of the Administrative Law Judge ("ALJ") to make certain findings, conclusions, and recommendations.

I. Respondents Except to the Following Findings of Fact and Credibility Determinations Contained in the ALJD

Because they are improper, contrary to record evidence, and not supported by the record considered as a whole, for the reasons set forth more fully in Respondents' Supporting Brief, Respondents except to each of the following findings of fact and/or credibility determinations contained in the ALJD.

1. ALJD, page 2, lines 18-20, reading as follows:

At all material times, Respondent Newark Electric, a New York corporation, has been an electrical contractor in the construction industry with an office and place of business in Newark, New York.

(Tr. 170-75, 200, 243-45, 266-67, 285-88; RX 5.)[1]

2. ALJD, page 3, lines 47-48 and page 4 line 1, reading as follows:

[1] In accordance with Section 102.46(b) of the Board's Rules and Regulations, the portions of the record relied upon in support of each Exception are designated in parenthesis following each exception. References to the transcript of the hearing are denoted as "Tr. ___." References to General Counsel's exhibits are denoted as "GCX ___," and references to Respondents' exhibits are denoted as "RX ___."

Contrary to the assertions of Colacino, I find that the Respondent Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012 even after selling all its assets to Respondent Colacino Industries.

(Tr. 170-75, 200, 243-45, 266-67, 285-88; RX 5.)

3. ALJD, page 4, lines 12-13, reading as follows:

The employer's contributions to the union funds came from Newark Electric.

(Tr. 59, 71, 172-73, 243-44, 285-86; GCX 9.)

4. ALJD, page 6, lines 28-35, reading as follows:

If the employer does not take advantage to terminate the letter [of assent C] between the 181st and 335th day, then the employer would be bound by the terms of the master agreement until it expires. The 335th day of the 1-year anniversary date of the letter is the last day possible to terminate the letter because the employer is required to provide a written 30 day notice to the NECA and Union before the anniversary date. If the employer fails to terminate the letter of assent after the first 12 months from the effective date, the employer is bound by the master agreement until its stated termination date as well as to all subsequent amendments and renewals.

(Tr. 96, 111-12, 138, 185-88, 191-92, 221-22, 273-76; GCX 1c, 6, 13.)

5. ALJD, page 6, lines 48-49 and page 7 line 1, reading as follows:

Davis said the letter of assent was signed in the evening of February 24, 2011 at the Newark Electric offices and approved by the NECA on May 6, 2011 (GC Exh. 6).

(GCX 6.)

6. ALJD, page 7, lines 25-26, reading as follows:

Davis, however, has always maintained that he was not aware of the existence of Respondent Newark Electric 2.0 until April 2012.

(GCX 9.)

7. ALJD, page 7, lines 32-35, reading as follows:

At the very latest date that the Respondent Newark Electric could terminate the letter of assent C and the collective-bargaining agreement was on January 24, 2012, which would be 30 days prior to the 1-year anniversary of the letter of assent

(Tr. 80-81, 83,96, 111-12, 138, 185-88, 191-92, 221-22, 273-76; GCX 1c, 5, 6, 10, 11, 13.)

8. ALJD, page 7, lines 47-48, reading as follows:

At the time the letter of assent C was signed by Respondent Newark Electric, there were several union members employed by Respondent Newark Electric.

(Tr. 28, 170-75, 183, 200, 243-45, 246-53, 266-67, 285-88, 291-93; GCX 6, 9; RX 2, 5.)

9. ALJD, page 8, lines 9-10, reading as follows:

The record shows that the payroll reports of the employees and the union local contributions and deductions reflect all three named Respondents.

(Tr. 28, 59, 70-71; GCX 9.)

10. ALJD, page 8, lines 26-29, reading as follows:

Colacino said that he raised the difficulties in operating two companies under one financial and administrative roof with Davis and he purportedly told Colacino that his problems would be resolved if Colacino also sign up Respondent Colacino Industries to a letter of assent C.

(Tr. 183-85.)

11. ALJD, page 13, lines 30-31, reading as follows:

I find that the letter of assent C was signed by Respondent Newark Electric on February 24, 2011.

(Tr. 80-81, 83,96, 111-12, 138, 171-75, 185-88, 191-92, 221-22, 243-44, 266-67, 283-86; GCX 6, 11, 13; RX 5.)

12. ALJD, page 14, lines 7-37:

The ALJ's determination that Jim Colacino's testimony that Newark Electric 2.0 had signed the letter of assent C lacks credibility.

(Tr. 28, 85-90, 171, 179, 183-88, 246-53, 291-93; GCX 6, 9, 10.)

13. ALJD, page 16, lines 5-37:

The ALJ's determination that Davis' testimony was more credible than Jim Colacino's testimony regarding the termination of the letter of assent C for Newark Electric.

(Tr. 28, 85-90, 171, 179, 183-88, 191-92, 215-22, 241-43, 246-53, 261, 291-93; GCX 5, 6, 9, 10, 12, 33, RX 4.)

14. ALJD, page 17, lines 31-32, reading as follows:

The record shows that Blondell was laid-off due to the lack of work by Colacino on July 20.

(Tr. 144-48, 227-29, 273-75, 276-79; GCX 21, 22, 23.)

15. ALJD, page 18, lines 45-52 and page 19, lines 1-5:

The ALJ's determination that Blondell's testimony that he was laid off was more credible than the testimony of Jim Colacino and Scott Barra that Blondell asked to be laid off.

(Tr. 145-48, 227-29, 273-76, 278; GCX 21, 22, 23.)

II. Respondents Except to the Following Conclusions of Law Contained in the ALJD

Because they are improper, contrary to record evidence, and not supported by the record considered as a whole, for the reasons set forth more fully in Respondents' Supporting Brief, Respondents except to each of the following conclusions of law contained in the ALJD.

16. ALJD, pages 1-2, footnote 3:

The ALJ's denial of the Respondents' motion to dismiss the complaint on the basis that the Board and those representing it had no authority to issue the complaint and prosecute the action because the Board did not have a quorum to issue a complaint and take other actions and, alternatively, Respondents' motion to dismiss the complaint because Acting General Counsel Lafe Solomon could not be properly appointed under the Federal Vacancies Reform Act and therefore lacked authority to issue the complaint in this case.

(GCX 1a, 1e)

17. ALJD, page 12, lines 12-50, and page 13 lines 1-21:

The ALJ's finding that Colacino Industries/Newark Electric 2.0 and Newark Electric are alter egos or a single employer, that at all material times, as alter egos, the Respondents Colacino Industries and Newark Electric have substantially identical management, business purpose, operating equipment, customers, purchases, premises, facilities and supervision, as well as common ownership and that at all material times as a single employer and have held themselves out to the public as a single-integrated business enterprise.

(Tr. 80-81, 166-75, , 238-40, 243-44, 266-67, 283-88; GCX 2, 3, 4, 5, 9, 11, 28; RX 3, 5.)

18. ALJD, page 13, footnote 12:

The ALJ's finding that the Board has jurisdiction over Respondent Newark Electric as a separate enterprise engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(Tr. 171-75, 243-44, 266-67, 283-85, 287-88; RX 5.)

19. ALJD, page 14, lines 38-48 and page 15, lines 1-25:

The ALJ's finding of an alter ego/single employer relationship between Colacino, NE 2.0 and NEC and conclusion that Colacino was bound to the master agreements because the letter of assent C with NEC was not effectively terminated by Colacino on June 29. Also the ALJ's further conclusions that because NEC did not avail itself of the option to terminate the letter of assent C, it could not repudiate the collective bargaining agreement and therefore violated Section 8(a)(5) and (1) of the Act by failing to apply the NECA agreement to unit employees.

(Tr. 111-12, 138, 185-88, 215-22, 241-43, 273-76; RX 4, GCX 2, 3, 6, 12, 13, 33)

20. ALJD, page 15, lines 29-52 and page 16, lines 1-36:

The ALJ's finding and underlying rationale that Colacino was not forced, duped or fraudulently induced in signing the letters of assent C for NE 2.0 and Colacino.

(Tr. 28, 85-90, 111`-12, 183-89, 191-92, 215-22, 246-53, 273-76, 291-93; RX 2, GCX 6, 9, 10, 13.)

21. ALJD, page 19, lines 7-20:

The ALJ's finding and underlying rationale that Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the employment of Blondell.

(Tr. 145-48, 227-29, 273-76, 278; GCX 21, 22, 23.)

22. ALJD, page 19, lines 24-50 and page 20, lines 1-14:

The ALJ's "Conclusions of Law" and underlying rationale finding that Respondents together constitute a single integrated business and were at all material times alter egos and a single employer within the meaning of the Act; that Respondents constitute a single employer engaged in commerce within the meaning of the Act; that Respondents violated Section 8(a)(5) and (1) of the Act; and that Respondents violated Section 8(a)(3) and (1) of the Act.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

23. ALJD, page 20, lines 18-51 and page 21, lines 1-7:

The entire portion of the ALJ's Decision entitled "Remedy."

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

24. ALJD, page 21, lines 8-44 and page 22, lines 1-32:

The entire portion of the Order requiring Respondents to cease and desist from certain activity and to take affirmative action as set forth in the ALJD.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

25. The Appendix to the ALJD entitled "Notice to Employees" in its entirety.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

III. Respondents Except to the Failure of the Administrative Law Judge to Make Certain Findings, Conclusions and Recommendations

The failure of the Administrative Law Judge to make each of the following findings, conclusions and/or recommendations was improper, contrary to the record evidence, not supported by the record considered as a whole, and contrary to established law, as set forth more fully in Respondents' Supporting Brief.

26. ALJD, page 15, lines 27-52 and page 16 lines 1-37:

The ALJ's failure to find the Respondents' defense based on the doctrines of detrimental reliance, equitable estoppel, misrepresentation and/or unclean hands meritorious.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

27. ALJD, page 15, lines 27-52 and page 16 lines 1-37:

The ALJ's failure to find the Respondents' defense based on the doctrines of fraud in the execution and/or fraud in the inducement meritorious.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

28. ALJD, page 14, lines 10-41:

The ALJ's failure to find and conclude that Respondents timely terminated all letters of assent C.

(Tr. 11-12, 28, 32, 80-81, 83-84, 85-90, 96, 111-12, 138, 145-48, 152-53, 166-69, 171-73, 174-75, 179, 182, 183-84, 185-88, 189, 191-92, 215-17, 218-22, 227-29, 238-39, 241-44, 246-53, 261, 266-67, 273-76, 278, 283-88, 291-93; RX 2, 3; GCX 1a, 1c, 1e, 1i, 2, 3, 4, 5, 6, 9, 10, 12, 13, 16, 17, 21, 22, 23, 28, 33.)

Dated: January 30, 2014
Pittsford, New York

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEWARK ELECTRIC CORP.,
NEWARK ELECTRIC 2.0, INC.,
AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and

Case No. 3-CA-088127

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 840

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

A. Introduction

On August 28, 2012, the International Brotherhood of Electrical Workers Local 840 (the "Union") filed the Original Charge against Newark Electric Corp. ("NEC") and Colacino Industries, Inc. ("Colacino"). (GC Ex. 1a). The Original Charge alleged that NEC and Colacino: (i) violated Sections 8(a) (1) and (3) of the Act by terminating Anthony Blondell because of his concerted protected activity and membership in and support of the Union; and (2) violated Section 8(a) (5) of the Act by abnegating a collective bargaining agreement mid-term with the Union on June 20, 2012.

On October 25, 2012, the Union filed an Amended Charge against NEC, Colacino, and Newark Electric 2.0 ("NE 2.0") (GC Ex. 1c). The Amended Charge alleged that NEC, Colacino and NEC 2.0: (i) violated Sections 8(a) (1) and (3) of the Act by *laying off and/or constructively discharging* Anthony Blondell because of *the Employer's plan to work non-union*; and (2) violated Section 8(a) (5) of the Act by abnegating a collective bargaining agreement mid-term with the Union on *July 20*, 2012. (GC Ex. 1c) (changes in Amended Charge noted in italics).

On May 30, 2013, the Board, by its Acting General Counsel, filed a Complaint against Respondents NEC, Colacino and NEC 2.0 based on the allegations in the Amended Charge. (GC Ex. 1e). Respondents filed a timely Answer to the Complaint which was twice amended prior to the hearing. (GC Exs. 1g, 1h, and 1i). This matter was heard on August 26 and 27, 2013. At the outset of the hearing Respondents moved to dismiss the Complaint. (Tr. 11-12). The Administrative Law Judge reserved judgment on that motion, indicating that the ruling would be part of the decision. (Tr. 12). At the close of the hearing the Administrative Law Judge set October 1, 2013 as the deadline for filing briefs. (Tr. 302). Based on the government shutdown, the ALJ notified the parties that the deadline for filing briefs was extended to November 1, 2013.

After receiving briefs, the ALJ issued his decision ("ALJD") on January 6, 2014, in which he found that Respondents Newark Electric Corp. ("NEC"), Newark Electric 2.0, Inc. ("NEC 2.0") and Colacino Industries, Inc. ("Colacino") violated Section 8(a)(5) and (1) of the Act by failing and refusing to apply the terms and conditions of the February 24, 2011 Letter of Assent C and the June 1, 2012 through May 31, 2015 collective bargaining agreement with the IBEW (the "Union") and NECA, Finger Lakes Chapter, violated Section 8(a)(3) and (1) of the Act by discharging employee Anthony Blondell. Timely exceptions were filed by Respondents.

B. Statement of Facts

1. Colacino Industries, Inc.

Colacino Industries was formed in February 2000 by James Colacino, its President and 100% owner. (R. Ex. 3; Tr. 166, 238-39). Colacino's primary business is as an automation systems integrator providing high technology solutions, doing software development, software service and hosted software applications mainly for the water and wastewater, food industry, and manufacturing similar to what would be seen in a GM plant. (Tr. 166-67, 170). In the realm of its automation house and systems integration work Colacino does things such as building automation systems, high technology robotic welding systems, telemetry, SCADA (shorthand for "Supervisory Control And Data Acquisition," which is a type of industrial control monitoring system) and cloud computing. (Tr. 240). As a small percentage of its business Colacino also does traditional "pipe and wire" electrical contracting work. (Tr. 167, 170). Prior to 2011 Colacino was a non-union company.

2. Newark Electric 2.0

Newark Electric 2.0 was also formed by James Colacino, its President and 100% owner, on March 8, 2011. (GC Ex. 28; Tr. 167-69). NE 2.0 was formed as the result of a number of years of discussions between Mr. Colacino and Union Business Agent Mike Davis (detailed below) wherein Mr. Davis attempted to persuade and cajole Mr. Colacino into signing Colacino

to an 8(f) Letter of Assent – A agreement with the Union (see, e.g., GC Ex. 4). Mr. Colacino specifically formed NE 2.0 with the purpose of segregating out the small percentage of Colacino's business that still performed all of the "pipe and wire" bargaining unit work covered by the Union's multi-employer agreements with the Finger Lakes Chapter of N.E.C.A. (Tr. 171; GC Ex. 2, 3). Simultaneously with its formation, Mr. Colacino signed NE 2.0 to a Letter of Assent C with the Union effective February 24, 2011. (Tr. 179; GC Ex. 6).

3. Newark Electric Corp.

Newark Electric Corp. ("NEC") was formed in May 1979 and was at all times 100% wholly owned by Richard Colacino (James Colacino's father). (R. Ex. 5; Tr. 171-73, 283-85). While James Colacino worked for his father Richard at NEC in the 1970's, 1980's and 1990's, at no time was James Colacino ever an owner or officer of NEC or authorized to sign contracts and agreements binding NEC; he was simply an employee. (Tr. 171, 285). In 2000 Richard Colacino sold the assets, name and likeness, good will, and customer base of NEC to James Colacino for five-hundred thousand dollars ($500,000.00). (Tr. 172-73, 243-44, 285-86). After paying off a tax lien that prevented him from immediately dissolving the company, Richard Colacino was able to finally dissolved NEC on April 3, 2013. (GC Ex.; Tr. 174-75, 266-67, 287-88).

4. Mike Davis Signs Up NE 2.0 and then Colacino

Mike Davis relentlessly pestered, cajoled and used underhanded business tactics for over five years with the singular goal of pressuring Mr. Colacino into signing his company up with the Union. Mr. Davis successfully wore Mr. Colacino down to the point where Mr. Colacino capitulated and went to the time and expense of creating a new company, NE 2.0, in order to segregate the small amount of traditional electrician "pipe and wire" portion of work out of his business (Colacino Industries) and into that new company so that he could sign NE 2.0 to a Letter of Assent C with the Union. (Tr. 183, 246-53, 291-93). The evidence shows that the frequency of Mr. Davis' unwelcomed intrusions on Mr. Colacino and his business escalated over

time and his tactics became increasingly aggressive. Mr. Davis stalked Mr. Colacino at his business for months; circling in the parking lot and parking and waiting as much as an hour and a half or more for Mr. Colacino to show up so he could press him about signing Colacino Industries with the Union. (Tr. 291-92). Mr. Davis habitually barged into Mr. Colacino's place of business and walked past his staff to get to Mr. Colacino in his office in the back to badger him about signing with the Union. (Tr. 291-92). Mr. Davis inundated Mr. Colacino with calls, texts, and messages, including Facebook comments. (Tr. 248, 291-23). At one point, Mr. Davis provided Mr. Colacino with an electrician from the hiring hall, Tony Blondell, as a trial (and a salt) to show the benefits of Union affiliation. (Tr. 249-53). When Mr. Colacino would not agree to sign Colacino Industries up with the Union Mr. Davis ended that relationship and forced Mr. Blondell to come back to the hall; threatening to make Blondell pay $38,000 into the Union benefits funds if he did not (a threat that he apparently holds over Mr. Blondell's head to this day). (Tr. 249-53).[1] Mr. Davis also engaged in a campaign of economic blackmail against Mr. Colacino by hiring his employees away and then laying them off to both deprive him of his skilled workforce and cause Mr. Colacino significant unemployment expenses. (Tr. 253, 254).

Mr. Colacino explained over and over to Mr. Davis that he did not believe that the Union and the employees it could supply from the hiring hall were a good fit for the vast majority of his business. (Tr. 189). Undaunted, Mr. Davis continued and escalated his pressure tactics. Every time he cornered Mr. Colacino at his business he would have a Letters of Assent (A and/or C)

[1] This scenario was deliberately orchestrated by Mr. Davis. Mr. Blondell testified that when he went to work for Mr. Colacino it was as a Union subcontractor; Blondell Electric, LLC. (Tr. 152-53). Mr. Colacino testified that the first time he paid Mr. Blondell, he wrote a check to Mr. Blondell for his net pay, minus taxes, and wrote another check to the Union for Mr. Blondell's benefits. (Tr. 249, 251). Mr. Davis told Mr. Colacino not to do that and that he needed to pay everything to Mr. Blondell directly, (Tr. 249-50). Per Mr. Davis' instructions Mr. Colacino paid everything to Mr. Blondell as a non-union contractor, which gave Mr. Davis a way to essentially blackmail Mr. Blondell with the threat of forcing him to repay $38,000 into the Union benefits funds if he did not do what Mr. Davis told him to do. (Tr. 249-50).

ready for him to sign. (Tr. 182; see, e.g., R. Ex. 2). At his wits end because of Mr. Davis' unrelenting and escalating pressure tactics (e.g., stripping Mr. Colacino of all his pipe and wire technicians), Mr. Colacino ultimately capitulated and created NE 2.0 to sign the Letter of Assent C with the Union on February 24, 2011.[2] (GC Ex. 6).

The ALJ's determination that Mr. Davis' denial at the hearing the he knew Mr. Colacino was creating a new company to sign the Letter of Assent C was credible was erroneous. The ALJ took Mr. Davis' testimony at face value testimony without addressing any of the glaring inconsistencies in it. Although the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of the relevant evidence shows that those resolutions are incorrect, Bantek West, Inc., 344 NLRB No. 110 (2005) (citing Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 [3d Cir. 1951]), Respondents submit that sufficient evidence exists to overrule the ALJ's credibility determinations in this case.

Although Mr Davis claimed not to know anything about NE 2.0, he acknowledged getting payroll reports from NE 2.0 beginning in March 2011, right after NE 2.0 was formed and the Letter of Assent C was signed. (Tr. 28; GC Ex. 9). Based on the payroll reports he was receiving, however, Mr. Davis clearly knew of NE 2.0's existence, since the very first report he received identified "Newark Electric 2.0" as the employer. Further, although the ALJ completely failed to address this point, Mr. Davis' testimony as to his knowledge of Mr. Colacino's companies was extraordinarily confused and flatly self-contradictory. Mr. Davis testified that he told Mr. Colacino that he could not create a Union company to go with his non-Union company and vehemently denied that's what was happening when "Newark Electric" (NE 2.0) signed the first Letter of Assent C with the Union. (Tr. 85-86). Mr. Davis then clumsily

[2] The ALJ erroneously found that "Davis said the letter of assent was signed in the evening of February 24, 2011 at the Newark Electric offices and approved by the NECA on May 6, 2011 (GC Exh. 6)" (ALJD, page 6, lines 48-49 and page 7 line 1). GCX 6 clearly shows that the IBEW international union approved that letter of assent C on May 6, 2011. In fact, there was no proof in the record indicating that NECA ever saw, much less approved, the letter of assent C.

danced around the issue of NE 2.0 doing Union work under the Letter of Assent C and Colacino Industries not being signed up as a Union contractor. He first testified that the Union would not permit an employer to form a new company to sign with the Union and do Union work while the other company remained non-Union. (Tr. 86-88). Upon further questioning, however, he admitted that he knew that Mr. Colacino had two companies before he signed any Letters of Assent C, and that he believed Mr. Colacino to be the owner of Newark Electric and the owner of Colacino Industries. (Tr. 88-89). When then pressed as to why he permitted Mr. Colacino to sign only one of his two companies with the Union (which he had testified was not permissible) Mr. Davis made the following garbled and self-contradictory responses:

Q: *But you knew he had two companies, right?*
A: *Uh-huh.*
Q: *You just testified to that.*
A: *Right.*
Q: *So, he's going to, he's telling you –*
A: *Well, you're telling me that –*
Q: *-- he's going to sign up one of them.*
A: *I did not say that (a) one could remain this or one could remain that, that discussion never took place, so that's why I guess I'm having the issue of answering that. I didn't have that discussion.*
Q: *Well, you knew, you testified that you knew he had two companies.*
A: *Yeah.*
Q: *And on February 24 of 2011 he signed one of them up according –*
A: *Yep.*
Q: *-- to you?*
A: *Right.*
Q: *And you believe that company to be Newark Electric Corp.*
A: *That's correct.*
Q: ***So, at that point in time you didn't have any problem with him having a Union company and a non-union company.***
A: ***Correct.*** (Tr. 89-90)(emphasis supplied).

The ALJ's conclusion that that Mr. Colacino's testimony that Newark Electric 2.0 had signed the letter of assent C lacks credibility is equally erroneous and bereft of logical support. First, it is undisputed that Mr. Colacino created a second company, Newark Electric 2.0. If in fact Mr. Colacino controlled Newark Electric Corporation and sign it to the letter of assent C as

the ALJ concluded, he would never have needed to create Newark Electric 2.0, which he inarguably did. The ALJ's decision to credit Mr. Davis' confused and self-contradictory testimony and blindly ignore the plain and obvious purpose of Mr. Colacino's creation of Newark Electric 2.0 just doesn't wash in the tub of common sense. This is particularly the case given the other indisputable evidence in the record which supports Mr. Colacino's testimony.

According to its terms, Mr. Colacino was unable to terminate the Letter of Assent C for the first 180 days; *viz.*, until August 22, 2011. (GC Ex. 6). It soon became clear, however, that keeping NE 2.0 as a separate company was economically and logistically unsustainable. As a startup company NE 2.0 did not have the necessary cash reserves to deal with the cash flow issues created by slow-paying customers and the need to meet payroll and other expenses. (Tr. 183-84). In addition, although Mr. Colacino had originally been informed by his insurance carrier that the insurance for NE 2.0 would be minimal, in reality his cost went up exponentially both because NE 2.0 was a new business and because Mr. Davis had stripped him of employees, monumentally increasing his historically nearly nonexistent unemployment insurance expenses. (Tr. 184). When Mr. Colacino brought those issues to Mr. Davis' attention, Mr. Davis proposed signing Colacino Industries to the Letter of Assent C. (Tr. 184)[3].

When they talked about signing Colacino Industries to a Letter of Assent C, Mr. Davis told Mr. Colacino that a single person (Jim Colacino) could not have two Letters of Assent C with the Union. (Tr. 185). Mr. Davis told Mr. Colacino that they would have to dissolve or in

[3] The ALJ erroneously stated that "Colacino said that he raised the difficulties in operating two companies under one financial and administrative roof with Davis and he purportedly told Colacino that his problems would be resolved if Colacino *also* sign up Respondent Colacino Industries to a letter of assent C." (italics added) (ALJD, page 8, lines 26-29). What Mr. Colacino actually said was "And, Mike said, look, we can simplify it and I did ultimately agree, just sign Colacino Industries, go back to operating it under one footprint and I said, that's what I'll do." (Tr. 184). The reference to "one footprint" was to having only one company signed up under a Letter of Assent C.

some fashion make the Letter of Assent C with NE 2.0 go away to then have a single Letter of Assent C with Colacino Industries. (Tr. 185). The same day that Mr. Davis told Mr. Colacino this (July 20, 2011) Mr. Colacino agreed to sign, and then signed, Colacino Industries to a Letter of Assent C with the Union. (Tr. 185; GC Ex. 10). *Note: on July 20, 2011, when Mr. Colacino signed Colacino Industries to the Letter of Assent C he did not have the legal right to terminate NE 2.0's Letter of Assent C because they were still within the initial 180 day period when it could not be terminated by him.*

While Mr. Colacino could not terminate NE 2.0's Letter of Assent C on July 20, he had no reason to believe that the Union could not do so, and in fact was led to believe that it could based on Mr. Davis' assertions that a single person was not permitted to have more than one Letter of Assent C. (Tr. 185-88). Moreover, Mr. Davis also represented to Mr. Colacino just before he signed Colacino Industries to the Letter of Assent C that he would either do so or redate the NEC 2.0 Letter of Assent C to make it run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C. (Tr. 185-88). Mr. Davis later told Mr. Colacino that he had redated NE 2.0's Letter of Assent C to run concurrently with Colacino Industries' Letter of Assent C. (Tr. 186, 191-92).[4]

The July 20, 2011 Letter of Assent C could not be terminated prior to January 15, 2012 (180 days after it was executed). That means that to the extent that the NE 2.0 Letter of Assent C still existed, it could not be terminated between August 22, 2011 and January 15, 2012 based on its original execution date. Although the 1 year anniversary of NE 2.0's original Letter of Assent C came and went on February 24, 2012, the Union never communicated to Mr. Colacino

[4] The Union never provided Mr. Colacino with that redated Letter of Assent C. (Tr. 186, 192). In his own words, Mr. Colacino *"... had taken Mike [Mr. Davis] on his word that, one, you couldn't have two companies signatory, two letters of assent C with a single owner and that by his - his comment to me that he had re-dated that, I just went back to running the business. I never gave it another thought ..."* (Tr. 188).

that NE 2.0 was at that point in any way still bound by the NE 2.0 Letter of Assent C. ***This lack of action by Mr. Davis and the Union is very telling, in that it was entirely consistent with Mr. Davis' representation to Mr. Colacino that NE 2.0's Letter of Assent C had either been dissolved or redated to July 20, 2011.***

After having given the Union a fair trial period to prove the economic benefits that Mr. Davis had promised, Mr. Colacino determined that it was simply not advantageous to continue having his company be a union signatory. In April 2012 Mr. Colacino instructed his CFO, Kevin Groff, to take the necessary steps to terminated Colacino Industries' Letter of Assent C with the Union. (Tr. 215-16). Letters terminating Colacino Industries' Letter of Assent C were sent to the Union and Finger Lakes NECA. (Tr. 216-17; GC Exs. 12, 33). Mr. Colacino did not send similar letters regarding NE 2.0's Letter of Assent C at that time because he believed that Mr. Davis had nullified the NE 2.0 Letter of Assent C, and even if it still existed NE 2.0 was no longer being used (it was essentially an empty shell) and the Union knew that. (Tr. 217-18). Significantly, Acting General Counsel failed to adduce any evidence that Finger Lakes NECA still thought that NE 2.0 was a signatory. Further, although Mr. Colacino clearly offered to discuss how the Union could support NE 2.0 in the aftermath of his terminating Colacino Industries' Letter of Assent C (telling the Union that he "*... would like to schedule a meeting with you [Mr. Davis] to discuss the reasons for this decision and how the IBEW can support NEC 2.0, Inc. .... Please call me at your earliest convenience to schedule a meeting.*" (GC Ex. 12, p. 1), the Union never responded. (Tr. 261).

When Mr. Colacino learned that the Union was taking the position that he was still a union signatory by virtue of NE 2.0's Letter of Assent C, he immediately directed Mr. Groff to terminate that purported Letter of Assent C just as he had done with Colacino Industries.

(Tr. 218-20; GC Ex. 13).[5] NE 2.0's Letter of Assent C was terminated by letters dated June 29, 2012. (Tr. 221; GC Ex. 13). Significantly, the termination letter references "... *the letter of assent dated 7/20/11* ...". (GC Ex. 13)(emphasis supplied). This clearly reflects Mr. Davis' agreement with Mr. Colacino to redate NE 2.0's Letter of Assent C to run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C and his assurances to Mr. Colacino that he had in fact done so. Per the express and unequivocal terms of the Letter of Assent C, Mr. Colacino was legally able to terminate the Letter of Assent C, at any time after the initial 180 days and up to the 1 year anniversary of its signing. (GC Exs. 5, 6, 10). The only limitation is not on the ability to terminate the Letter of Assent C during that 180 – 1 year anniversary period, but rather the fact that the termination itself cannot become effective sooner than 30 days after the written notice terminating the Letter of Assent C. Thus, as Mr. Colacino testified, although his termination letters for NE 2.0 state that the agreement was terminated as of the date of the letter (June 29, 2012) in actuality the effective termination date would have been July 29th. (Tr. 221-22). Mr. Colacino also immediately started the process of officially dissolving NE 2.0 in July 2012 (in actuality it had been an empty shell since the time Mr. Colacino signed Colacino Industries to a Letter of Assent C with the Union in July 2011), which process was completed in November 2012. (R Ex. 4; Tr. 241-43).

[5] Mr. Colacino testified that although he instructed Mr. Groff (who is no longer employed by Colacino) to send termination letters to both the Union and Finger Lakes NECA, he did not have a copy of the letter that would have gone to NECA terminating NE 2.0's Letter of Assent C. (Tr. 220-21). Clearly Acting General Counsel seeks to have the ALJ draw the conclusion that NE 2.0's Letter of Assent C was not properly terminated based on the absence in the record of a termination letter to NECA. Such a conclusion would be unjustified for a number of reasons. First, NECA is not a party to this proceeding and Acting General Counsel offered no evidence in the record that NECA has ever asserted that NE 2.0 or Colacino Industries are still bound to its agreements with the Union (GC Exs. 2, 3). Second, Acting General Counsel could have subpoenaed a NECA representative to testify and/or produce documents relating to Colacino Industries and NE 2.0 and failed to so or request an adjournment to do so after reviewing the copious records it subpoenaed from Colacino and determining that Colacino did not have a copy of the letter to NECA. Third, based on Acting General Counsel's failure to call such a witness Mr. Colacino's uncontradicted testimony that letters were sent to both the Union and NECA terminating NE 2.0's Letter of Assent C must be credited.

5. **Anthony Blondell's Separation**

Mr. Blondell testified that Mr. Colacino never told him to quit the Union; he simply told Mr. Blondell of his plan to terminate the Letter of Assent C with the Union. (Tr. 148). At Mr. Blondell's specific request Mr. Colacino separated him from the company and gave him a letter stating that he was being laid off for lack of work. (Tr. 228, 276; GC Ex. 23). Scott Barra, a former Union member who had been the Union's Vice-President and a member of its Executive Board, testified that both Colacino Industries' employees and the Union and Mr. Davis knew that Mr. Colacino had a year to terminate the Letter of Assent C, and that July 20 was the date by which the Union acknowledged internally he had to do so. (Tr. 273-75). Mr. Barra testified that he was present when Mr. Blondell told Mr. Colacino that he was not going to leave the Union but did not want the Union to be able to say that Colacino was still in the Union because he as a Union member continued to work for Colacino after the July 20 date. (Tr. 278). Mr. Barra testified that Mr. Blondell told Mr. Colacino that "… if you just lay me off for lack of work, then they [the Union] can't use me as a tool to tell you that you're still in the union cause I work for you." (Tr. 278).

Mr. Blondell testified that at the time he was laid off they had not finished the jobs he was working on and that there was work for him. (Tr. 146-47). The ALJ asked Mr. Blondell what was discussed in a conversation referenced in his layoff letter between Mr. Blondell and Mr. Colacino earlier in the day. (Tr. 145-46; GC Ex. 23). Mr. Blondell was somewhat opaque in his response to the ALJ, stating *"That it was probably going to be my, you know, it was going to be my last day but we both knew that from prior days."* (Tr. 145). When the ALJ followed up by asking whether Mr. Colacino told him why, Mr. Blondell responded: *"No, because I mean we both knew the reason I was leaving, it was because of, I know I keep going back to the date July 20th, but July 20 was the last day that as me being a Union employee. It was the last day I was going to work there."* (Tr. 145). When asked by the ALJ whether he questioned the

statement in the letter that he was being laid off because of a lack of work Mr. Blondell responded: *"No, I didn't. .... I guess it don't matter to me at the time. I didn't, I wasn't, I mean I read it and just, I didn't, whether it was lack of work for a Union employee, I mean I didn't really, I didn't look into it deep or nothing."* (Tr. 146).

Mr. Colacino testified that Mr. Blondell was a good employee and that he wanted to retain him. (Tr. 227-29). This is consistent with the language of Mr. Colacino's letter, in which he states: *"Your employment here was sincerely appreciated and you are considered to be among the best in the trade. That said, I hope the future holds opportunities for us to work together again."* (GC Ex. 23). Mr. Colacino testified that: *"... So it was with incredible regret to even write that letter, but I did it on his insistence, because he inferred and insinuated that the union was going to use that as a tool against me if I didn't lay him off for lack of work."* (Tr. 229) (emphasis supplied). In fact, Mr. Colacino told Mr. Blondell that he didn't have a lack of work, but Mr. Blondell insisted that Mr. Colacino had to lay him off to protect his business. (Tr. 229). At the time he was speaking with Mr. Blondell Mr. Colacino did not understand that it was Mr. Blondell, not he or his company, that would get into trouble if Mr. Blondell stayed in the Union and continued to work for Mr. Colacino. (Tr. 229).

Acting General Counsel failed to adduce any proof that Mr. Colacino ever planned to change Mr. Blondell's compensation after Colacino Industries reverted to its non-union status. In fact, the *status quo ante* would have been as it was before Mr. Colacino signed the first Letter of Assent C, when Mr. Blondell was in the Union and working for Mr. Colacino as a Union subcontractor and Mr. Colacino paid his wages and Union benefits, either to the Union and Mr. Blondell by separate checks or all to Mr. Blondell as Mr. Davis insisted, with Mr. Blondell to then make the appropriate payments to the Union for his dues and benefits. (see, footnote 1). In sum, the evidence in the record shows that Mr. Colacino never told Mr. Blondell that he had to quit the Union to stay employed and no proof was adduced to show that Mr. Blondell could

not have returned to his status of working for Colacino as a Union subcontractor or that his pay or benefits would have changed if he had elected to remain employed by Colacino rather than asking Mr. Colacino to lay him off.

II. ISSUES PRESENTED

The following issues encompass all of the Respondent's Exceptions to the decision of the ALJ:

1. Whether the ALJ erred in not granting Respondents' motion to dismiss the complaint.

(This issue encompasses Respondents' Exceptions 16; 18; 20; 22-25; 26-27.)

2. Whether the ALJ erred by concluding that NEC was in a single employer/alter ego relationship with either Colacino or NE 2.0;

(This issue encompasses Respondents' Exceptions 1-13; 17-19; 21-25; 28.)

3. Whether the ALJ erred by failing to find that there was no enforceable Letter of Assent C between Respondents and the Union.

(This issue encompasses Respondents' Exceptions 1-9; 11-13; 17-20; 22-28.)

4. Whether the ALJ erred by failing to find that Respondent did not condition Anthony Blondell's employment on working for a non-union company.

(This issue encompasses Respondents' Exceptions 14-15; 21; 22-25.)

III. ARGUMENT

POINT I

THE ALJ ERRED BY NOT DISMISSING THE COMPLAINT BASED ON JURISDICTIONAL GROUNDS.

The *sine qua non* of any NLRB proceeding is that "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice *the Board*, or any agent or agency designated by the Board for such purposes, *shall have power to issue and cause to be served upon such a person a complaint* stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, ..." (29 U.S.C. §160(b)) (emphasis supplied). The Board is at all times required to maintain a quorum of three of its five members. 29 U.S.C. §153(b); New Process Steel, L.P. v NLRB, 130 S. Ct. 2635, 2645 (2010). "It is undisputed that the Board must have a quorum of three in order to take action." Noel Canning v. NLRB, 705 F.3d 490, 499 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24 2013). Thus, Respondents submit that the Complaint must be dismissed because at the time the Complaint was filed, the NLRB did not have a quorum and could not, therefore, exercise the power of the Board in filing Complaints or taking any other actions.

The Complaint was filed on May 30, 2013. (GC Ex. 1e). When the Complaint was filed, the Board consisted of Chair Mark Pearce and Members Sharon Block and Richard Griffin. Members Block and Griffin were appointed as recess appointments by President Obama on January 4, 2012, and sworn in on January 9, 2012.[6] It is submitted that, for the reasons set forth in Noel Canning, Members Block and Griffin were invalidly appointed because they were appointed during an intrasession break, and not an intersession break, as the law requires for valid Recess appointments. Thus, when the Complaint was issued in May 2013 the Board lacked

[6] Terence Flynn was also appointed and sworn in on these dates but subsequently resigned in July 2012 before the Complaint at bar was issued.

a quorum, having only one validly appointed Member, and its actions were, consequently, void *ab initio*. See also, NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4th Cir. 2013); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013). Accordingly, since the Board lacked a quorum in May 2013, and therefore any power to act, the Complaint must be dismissed.

As an alternate basis for dismissal Respondents submit that the Complaint must also be dismissed because it was initiated without a validly appointed General Counsel or Acting General Counsel. See, Hooks v. Kitsap Tenant Support Svcs. Inc., 2013 U.S. Dist. LEXIS 114320, 196 L.R.R.M. (BNA) 2703 (W.D. Wash. Aug. 13, 2013) (Decision in the Record as R. Ex. 1). This Complaint (GC Ex. 1e) was issued pursuant to the authority of Acting General Counsel Lafe Solomon ("ACG Solomon"). If, as Respondents assert, Mr. Solomon was never validly appointed to the position of Acting General Counsel, then the issuance of the Complaint at bar was an *ultra vires* act, and the Complaint must be dismissed as a matter of law.

The National Labor Relations Act establishes the procedure for the appointment of the NLRB's General Counsel and, if necessary, it's Acting General Counsel, and the singular authority of General Counsel with regard to the investigation and issuance of complaints:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners [administrative law judges] and legal assistants to Board members) and over the officers and employees in the regional offices. *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10* [29 USCS § 160], *and in respect of the prosecution of such complaints before the Board*, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, *but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted*

> *to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* 29 U.S.C. 153(d) (italics added).

President Obama nominated Mr. Solomon to serve as Acting General Counsel of the NLRB on June 21, 2010, which was during the second session of the 111th Congress.[7] The second session of the 111th Congress ran from January 5, 2010, through December 22, 2010.[8] President Obama subsequently nominated Mr. Solomon to be the General Counsel of the NLRB on January 5, 2011, which was the first day of the first session of the 112th Congress.[9] The Senate did not confirm Mr. Solomon's appointment. The first session of the 112th Congress ended on January 3, 2012, and President Obama did not nominate another General Counsel or Acting General Counsel prior to the issuance of the Complaint at bar.

During the relevant time period Mr. Solomon purported to be the Acting General Counsel. He was, however, only appointed Acting General Counsel during the 111th Congress, which ended on December 22, 2010, and President Obama never made an official nomination to the General Counsel position until after the expiration of the 111th Congress. Moreover, the Senate never confirmed Mr. Solomon's nomination as General Counsel during the 112th Congress, nor did President Obama make another nomination prior to the issuance of this Complaint. Accordingly, it is submitted that under the clear and unambiguous mandate of 29 U.S.C. § 153(d), Mr. Solomon was Acting Attorney General for only 40 days (which tenure expired on July 31, 2010), or, at the very latest, December 22, 2010 (the adjournment *sine die* of the 111th Congress). The original Charge was filed August 28, 2012, and the Complaint issued

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[7] See, NLRB website: http://www.nlrb.gov/who-we-are/general-counsel/lafe-solomon-acting-general-counsel

[8] See, U.S. Senate website: http://www.senate.gov/reference/Sessions/sessionDates.htm

[9] See, Congretional Record website: http://www.gpo.gov/fdsys/pkg/CREC-2011-01-05/html/CREC-2011-01-05-pt1-PgD1.htm

on May 30, 2013. (GC Ex. 1[a] and [e]). Since Mr. Solomon was never validly appointed as the Acting General Counsel, both the investigation *and* issuance of the Complaint in the matter were *ultra vires* acts.

In the Kitsap case, supra, the Board argued that ACG Solomon was validly appointed pursuant to the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 et seq., and therefore ACG Solomon's delegation of authority to file the Complaint against Kitsap was a valid act. As noted by the Kitsap court, however:

> The FVRA only permits the appointment of a person under specific circumstances and the only circumstance that could apply to Hooks is appointing a person who, within the last 365 days, has served as a personal assistant to the departing officer Id. § 3345(b). It is undisputed that Solomon has never served as a first assistant. Therefore, Hook's argument is without merit. (R. Ex. 1, pp. 3-4).

Based on the fact that AGC Solomon was never validly appointed to the Acting General Counsel position, it is submitted that the ALJ should grant Respondents' motion and dismiss the Complaint in its entirety.

POINT II

THE ALJ ERRED BY CONCLUDING THAT NEWARK ELECTRIC CORPORATION WAS IN A SINGLE EMPLOYER/ALTER EGO RELATIONSHIP WITH EITHER COLACINO INDUSTRIES OR NEWARK ELECTRIC 2.0.

The Board examines four factors to determine whether two nominally separate employing entities constitute a single employer. Those factors are: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) common control of labor relations. Carr Finishing Specialties, Inc., 358 NLRB No. 165 (2012). With regard to alter ego status, the Board looks at additional factors including whether the entities are substantially identical based on their management, business purpose, operating equipment, customers, supervision and common ownership. Id. It has been stipulated for purposes of this case that

Colacino Industries and NE 2.0 had a single employer/alter ego relationship based on the four factors above. The remaining question is whether there was a single employer/alter ego relationship between Colacino Industries and Newark Electric Corp. ("NEC").

Colacino and NEC do not satisfy any of the criteria used to measure single employer/alter ego status. At all times each entity was 100% owned and controlled by different individuals; Colacino by James Colacino and NEC by Richard Colacino. While NEC was a dormant company from 2000 until its dissolution in April 2013, the evidence shows that there was never any common management of the two companies. Colacino has at all times been managed by James Colacino while NEC was always managed by Richard Colacino. More to the point, there was never any interrelation of operations or common control of labor relations, inasmuch as Colacino was formed in 2000 and NEC went completely dormant in 2000 when Richard sold all of the assets, good will, and customer list to James Colacino for $500,000.[10] The only reason NEC was not completely dissolved in 2000 is that Richard Colacino had to finish paying off a tax lien against that company. When that tax lien was paid off NEC was promptly dissolved in 2013. Otherwise, NEC was completely defunct as of 2000. The fact that Richard Colacino went to work for his son at Colacino Industries after 2000 is further proof that NEC was no longer doing any business after its assets, good will and customer base were sold to Colacino. If NEC had continued to be an active and ongoing business then Richard Colacino would have devoted his time and labors to that business and would not have worked at Colacino Industries. Thus, if

[10] The ALJ erroneously concluded that the employer's contributions to the union funds came from Newark Electric (ALJD at p. 4, lines 12-13) and that the record shows that the payroll reports of the employees reflect all three named Respondents (ALJD at p. 8, lines 9-10). Since, as the ALJ recognized, Newark Electric had no assets (only undischarged tax liens as of 2000), none of the employer contributions could possibly have come from it. The ALJ's citation to GCX 9 does not prove otherwise. The only reference to "Newark Electric" is on the second page for the month of April 2011. This reference is clearly a typo, as the first and third pages are virtually identical and correctly identify Newark Electric 2.0 as the contributing employer. Moreover, both the ALJ and Union witness Mike Davis acknowledged at the hearing that GCX 9 pertained to NE 2.0 (Tr. 59).

the relationship of NEC and Colacino Industries were to be depicted by a Venn diagram, they would appear as two circles that never intersect – a null set if you will.

Although the Board's alter ego inquiry is somewhat broader in scope, the result is the same. In the vernacular, an alter ego is defined as a "second self" or another aspect of one's self. Both the vernacular and the Board's definition are premised, however, on the active existence of both entities at the point in time when the question of alter ego status is being determined. If Colacino and NEC had been actively engaged in business at the same time, then Acting General Counsel's proof regarding such things as names on invoices, markings of company vehicles, place of business, phones, e-mail addresses, etc. (E.g., GC Exs. 7, 19, 24-27, 29-32, 34) might lead one to the conclusion that these two companies were indeed alter egos. The missing link, the absent crucial underpinning if you will, is any evidence that these two companies were actively engaged in business at the same time within the relevant timeframe. They were not.

The unrefuted evidence in the record establishes that neither company ever had common management. While James Colacino worked for Richard Colacino at NEC prior to forming his own company and Richard Colacino works for James Colacino at Colacino Industries, neither ever had any management role in the other's company. It is utterly meaningless to say that NEC and Colacino are substantially identical when the evidence shows that for all practical purposes they never existed contemporaneously as business entities. The fact that Colacino used NEC's name, assets, and customer base is wholly attributable to the fact that it purchased them in 2000 when NEC ceased operating as an active business. Certainly NEC did not have the same business purpose as Colacino *since it had no business purpose whatsoever on and after 2000.* NEC also had no operating equipment, customers, or employees since 2000. All NEC retained after 2000 was a tax lien that had to be discharged before it could be finally dissolved. Thus, Colacino and NEC cannot be considered to be alter egos under Board law (or any other law for that matter).

POINT III

THE ALJ ERRED IN FAILING TO FIND THAT THERE WAS NO ENFORCEABLE LETTER OF ASSENT C AGREEMENT RESPONDENTS AND THE UNION.

It was stipulated that Colacino Industries properly and timely terminated its Letter of Assent C with the Union. (Tr. 83). It is also uncontested that NE 2.0 was dissolved and no longer exists. Thus, the only possible enforceable Letter of Assent C that exists in this case is the one between the Union and the company named Newark Electric; *not NE 2.0*. (GC Ex. 6). In fact, the Board attorney representing Acting General Counsel vehemently asserted just that during her opening: "*... the evidence will show that Newark Electric is alive and well as the face of Colacino Industries. Respondent may also argue that the letter of assent as signed on February 2011 was an agreement between Newark Electric 2.0 and the Union, but the document speaks otherwise.*" (Tr. 10).[11] While Colacino may be alive and well, the evidence adduced at the hearing shows that NEC was, at best, in a catatonic or Zombie-like state from 2000 – 2013, when it was finally put to complete rest.[12]

While James Colacino signed the February 24, 2011 Letter of Assent C, it is indisputable that he never had any ownership interest in NEC, was never an officer of NEC, and never had

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[11] If in fact Newark Electric [NEC] and Colacino Industries were one in the same entity, then query why the Union would ever have had Colacino Industries sign the second Letter of Assent C in July 2011. There would have been no need to do so, since under the Union's and Acting General Counsel's theory it already had Colacino Industries signed up with an anniversary clock that began in February 2011. It would make no business sense from the Union's perspective to extend the 1 year anniversary of the Letter of Assent C, and by extension, Mr. Colacino's time to opt out of that agreement. ***Moreover, if they were one in the same entity, then the first Letter of Assent C should have merged into the second Letter of Assent C, which Acting General Counsel has stipulated was properly and legally terminated by Mr. Colacino in April 2012.***

[12] The ALJ erroneously concluded that the letter of assent C was signed by Newark Electric and that Newark Electric employed several union members at that time (ALJD at p. 7, lines 47-48). The only proof that anyone was ever employed by Newark Electric was the testimony of Jim Colacino that he worked for Newark Electric prior to 2000. There was no proof in the record of any employees being employed by Newark Electric after 2000.

any authority to bind NEC to any agreements. Moreover, this Letter of Assent C, which was drafted by the Union, has NEC's Federal Employer Identification Number ("FEIN"), not that of NE 2.0, which did not even have an FEIN at when this agreement was signed. (Tr. 80-81; GC Ex. 9, at p. 4. [showing FEIN for NE 2.0] and GC Ex. 11[showing FEIN for Colacino]). That being the case, it is submitted that the only reason that Acting General Counsel has alleged and tried to prove that Colacino and NEC constituted a single employer/alter ego is that absent such a finding there is no proof that NE 2.0 ever entered into a legally binding Letter of Assent C with the Union. The entire case would rest, then, on the Letter of Assent C signed by Colacino Industries, which was properly and legally terminated by Mr. Colacino in April 2012.

If it is to be believed, then the testimony of Acting General Counsel's witness, Union Business Agent Mike Davis, fatally undercuts the allegation that there was an enforceable Letter of Assent C between the Union and NE 2.0. Mr. Davis steadfastly maintained throughout his testimony that he never knew NE 2.0 existed. (Tr. 32, 83-84). If one takes Mr. Davis at his word, and his further testimony that the Letter of Assent C *he prepared* was to be between the Union and the existing company, Newark Electric (NEC), then that Letter of Assent C is legally unenforceable and a nullity on its face, since it was not signed by an officer or owner of NEC, which was still legally in existence at that point in time. The only individual who could have signed NEC to the Letter of Assent C was its 100% owner and President, Richard Colacino; and he did not do so.

What is sauce for the goose is sauce for the gander. If Acting General Counsel and the Union are attempting to hold Colacino to the absolute letter of that Letter of Assent C agreement by stating that it was between the Union and NEC - *not NE 2.0* - and maintaining that it was not timely and effectively terminated by James Colacino, then they must, as a matter of legal imperative and intellectual honesty, also concede that this Letter of Assent C was void *ab initio*, and therefore completely unenforceable, since it was never entered into by anyone with authority

to bind Newark Electric (NEC). The only way for Acting General Counsel to cut this logical and legal Gordian Knot and salvage this portion of the Complaint is through creative use of the single employer/alter ego theory to tie Colacino and NEC together. As noted above, however, Colacino and NEC cannot be considered single employers/alter egos. Consequently, it is submitted that the ALJ clearly erred in not dismissing the portion of the Complaint alleging that the Respondents have failed and refused to bargain collectively with the Union.

1. Colacino and NE 2.0 Effectively Terminated the Letters of Assent C with the Union.

As noted above, Acting General Counsel stipulated that Colacino effectively terminated its Letter of Assent C with the Union, and thus there is no basis for finding that Colacino itself currently has any legal relationship with the Union. If, contrary to the express terms of the document itself, it is found that the February 24, 2011 Letter of Assent C with "Newark Electric" (GC Ex. 6) was in fact legally binding on NE 2.0, as opposed to NEC (see, Point C, supra), then it is submitted as an alternative basis for dismissing the Complaint that this Letter of Assent C was also effectively properly terminated prior to its 1 year anniversary.

As noted above, Mr. Colacino's agreement to sign Colacino Industries to a Letter of Assent C in July 2011 was premised and based on Mr. Davis' representations to Mr. Colacino that one individual could not have two Letters of Assent C, and that the Letter of Assent C with Newark Electric would have to dissolve or go away so that there was only a single Letter of Assent C. (Tr. 185). While Mr. Colacino could not terminate NE 2.0's Letter of Assent C on July 20 (the earliest it could have been terminated was August 22), he had no reason to believe that the Union could not do so, particularly in view of Mr. Davis' assertions that a single person was not permitted to have more than one Letter of Assent C. (Tr. 185-88). After all, it was the Union's agreement and the Union's rules. Further, subsequent to his signing Colacino Industries to the Letter of Assent C he was told by Mr. Davis that the Newark Electric Letter of Assent C

had been redated to make it run concurrently with Colacino Industries' July 20, 2011 Letter of Assent C. (Tr. 185-88, 191-92). In this vein Mr. Davis' conduct becomes extremely important; for it demonstrates beyond cavil that, contrary to his testimony at the hearing, in fact NE 2.0's Letter of Assent C was either dissolved or effectively redated to July 20, 2011.

Union members Messrs. Blondell and Barra testified that they and the Union knew that July 20, 2012 was the deadline by which Mr. Colacino had to terminate the Letter of Assent C and get out of the Union. (Tr. 111-12, 138, 273-76). Mr. Colacino had previously terminated the second letter of Assent C with Colacino Industries in April 2012, and so the only Letter of Assent C to which Messrs. Blondell and Bara could possibly have been referring was the original redated Letter of Assent C between NE 2.0 and the Union. In this case actions speak louder than words, and Mr. Davis' expression to his Union members that July 20 was Mr. Colacino's last day to get out of the Union operates as a recognition; nay an admission, that he had agreed with Mr. Colacino to redate NE 2.0's Letter of Assent C to July 20, 2012 so that it ran concurrently with Colacino Industries' Letter of Assent C. Otherwise, Mr. Davis would not have told Mr. Barra that he could not work for Mr. Colacino after July 20, and that he was pulling all the Union employees as soon as he heard that Mr. Colacino was going non-union because Mr. Colacino would already have been locked into a longer term relationship with the Union by virtue of the fact that NE 2.0's 1 year anniversary originally ended back in February 2012; before Mr. Colacino terminated Colacino Industries' Letter of Assent C with the Union. (Tr. 273-74). Mr. Davis would never have told his Union members this unless he had in fact either dissolved or redated NE 2.0's Letter of Assent C. Critically, although Mr. Davis was recalled as a rebuttal witness after Mr. Barra testified, he did not refute any of Mr. Barra's or Mr. Blondell's testimony. Thus, the fact that Mr. Davis told his Union members that Mr. Colacino had until July 20, 2012 to terminate his Letter of Assent C (and that if he did so they would be pulled from working for Colacino) bespeaks the truth of what Mr. Colacino testified to; *viz.*, that Mr. Davis

agreed, as part of signing Colacino Industries to a Letter of Assent C, to either dissolve or redate NE 2.0's Letter of Assent C.

The allegations in the Amended Charge also clearly demonstrate that Mr. Davis understood the anniversary date of the first NE 2.0 Letter of Assent C to have been redated to July 20. The Amended Charge alleges that Respondents violated the Act by "... abnegating a collective bargaining agreement mid-term with the Union on *July 20*, 2012." (GC Ex. 1c)(emphasis supplied). Mr. Colacino's termination letter was dated June 29, 2012, and states that NE 2.0's Letter of Assent C was being terminated *that day*. (GC Ex. 13). While Mr. Colacino admitted to being incorrect about the effective termination date (the 30-day notice period would have taken that date out to July 29, 2012) the only way a reference in the Union's Amended Charge to a July 20 date would make any sense would be if, as Mike Davis told Mr. Colacino, he had redated NE 2.0's Letter of Assent C to July 20, 2011 to run concurrently with the Colacino Industries' Letter of Assent C.

Just as Mr. Davis had manipulated Mr. Blondell into a position where he allegedly owed the Union $38,000 in benefit contributions, and thus was able to exert control over him, the evidence similarly shows that Mr. Davis also manipulated and deceived Mr. Colacino, to Mr. Colacino's detriment, with respect to the status of the February 24, 2011 Letter of Assent C with NE 2.0. Significantly, since the trial period specified in the Letter of Assent C during which Mr. Colacino was able to terminate the agreement was for a period of up to 1 year, the Statue of Frauds does not require the agreement to redate the Letter of Assent C to be in writing. See, New York General Obligations Law §5-701 (a)(1). Thus, an oral agreement, or, as in this case, the oral modification of a written agreement (Mr. Davis' agreement to redate the February 2011 NE 2.0 Letter of Assent C to run concurrently with the July 2011 Colacino Letter of Assent C), is fully enforceable, since it was to be performed within 1 year. Moreover, there was ample consideration for the oral modification inasmuch as Mr. Colacino relinquished a legal right by

pushing out from August 22, 2011, to January 2012 his ability to terminate NE 2.0's Letter of Assent C. (Tr. 186-87 *"I do know that when he mentioned that he had redated it, I [Mr. Colacino] was a little bit discouraged because I had assumed that one was going to come and go in its own time frame and, now, it basically extended that trial period, this letter of assent C, by four months."*). Thus, Mr. Colacino was fully within his legal rights to terminate the NE 2.0 Letter of Assent C in June 2012, prior to its redated July 20, 2012, 1 year anniversary.

Even if Mr. Davis' oral agreement to redate the February 24, 2011 Letter of Assent C with Newark Electric (or NE 2.0) was not enforceable as a matter of law, Mr. Davis would still be legally prevented from challenging Mr. Colacino's termination of that agreement in June 2012 based on the doctrines of detrimental reliance, equitable estoppel, and/or unclean hands. Equitable estoppel prevents a party from disputing certain facts after it has obtained a benefit by causing the other party to reasonably rely on the truth of those facts. See, e.g., Manitowoc Ice, Inc., 344 NLRB 1222, 1223 (2005); Red Coats, Inc., 328 NLRB 205, 206 (1999). It is clear that when Mr. Colacino signed the Letter of Assent C in July 2011 he wanted and intended only Colacino Industries to be bound by an agreement with the Union. Mr. Davis knew that all Mr. Colacino had to do if he wanted to completely end his relationship with the Union was wait a few weeks until August 22, 2011, at which time Mr. Colacino would be beyond the initial 180 day period during which he could not terminate NE 2.0's Letter of Assent C with no further consequences or liability to the Union. To his credit, Mr. Colacino told Mr. Davis that the reason it could not work out with NE 2.0 was because of the cash flow and other issues that this startup company was having. Mr. Colacino expressed a willingness to prolong the trial period for another 6 months by signing Colacino Industries to a new Letter of Assent C to see if the relationship could work with his established company. Since Mr. Colacino did not have the right in July 2011 to unilaterally terminate NE 2.0's Letter of Assent C with the Union, he relied on Mr. Davis' representations that the Letter of Assent C with NE 2.0 was either dissolved or

redated (leaving it to Mr. Davis to decide which based on his internal Union rules), with the result being Mr. Colacino forewent taking any action to terminate NE 2.0's Letter of Assent C within the original 1 year anniversary period (*viz.*, on or before February 24, 2012) because he had been materially mislead by Mr. Davis as to the status of that Letter of Assent C. Accordingly, it is submitted that the Union and Acting General Counsel should be estopped from claiming that Mr. Colacino did not timely terminate NE 2.0's Letter of Assent C in June 2012, prior to its redated 1 year anniversary.

In addition to the foregoing, the doctrines of fraud in the execution and/or fraud in the inducement also operate in this case to prevent the Union and Acting General Counsel from claiming that Mr. Colacino did not properly terminated NE 2.0's Letter of Assent C in June 2012. "Both fraud in the execution and fraud in the inducement require a finding that the Employer was in fact misled about what was being signed, and that the Employer relied on that misrepresentation when signing the document." Horizon Group of New England, JD(NY) 43-05 (2004); see, Positive Electrical Enterprises, Inc., 345 NLRB 915 (2005). When Mr. Colacino signed the second Letter of Assent C binding Colacino Industries on July 20, 2011, he did so having been misled by Mr. Davis as to what effect signing Colacino Industries to that second Letter of Assent C would have on NE 2.0's first Letter of Assent C. By his prior conduct (*viz.*, his personal and electronic near-stalking activities, his economic warfare vis-à-vis hiring his employees away and then laying them off, which both depleted his workforce and caused him significant economic costs in the form of paying unemployment benefits that he had never had to pay before, etc.), Mr. Davis had essentially bullied Mr. Colacino into signing that first Letter of Assent C and conditioned him to go along with whatever Mr. Davis stated concerning the Union's Letters of Assent C (again, the Union's agreement; the Union's rules). Thus, Mr. Colacino was both misled by Mr. Davis concerning the legal status of NE 2.0's Letter of

Assent C when he agreed to sign the second Letter of Assent C for Colacino Industries, and he plainly relied on Mr. Davis' statements to his detriment when he signed that agreement.

As noted above, the only limitation on the ability to terminate the Letter of Assent C between the 180 day and 1 year anniversary period timeframe is that the termination itself cannot become effective sooner than 30 days after the written notice terminating the Letter of Assent C. Thus, as Mr. Colacino testified, although his termination letters for NE 2.0 state that the agreement was terminated as of the date of the letter (June 29, 2012) in actuality the effective termination date would have been July 29th. (Tr. 221-22). Practically speaking this failure to give the full 30 days' notice was of no significance, since NE 2.0 had not had any employees since July 2011 when Colacino Industries signed its Letter of Assent C (and therefore, *a fortiori*, did not do any bargaining unit work requiring the remittance of any payments to the Union or its funds) and was soon to be dissolved by Mr. Colacino. Business Agent Mike Davis agreed, testifying that if NE 2.0's Letter of Assent C were redated to July 20, then he would not any objection to the timing of Mr. Colacino's June 29, 2012 termination letter. (Tr. 96). Accordingly, it is submitted that both Letters of Assent C were legally and properly terminated and that the portion of the Complaint alleging that the Respondents have failed and refused to bargain collectively with the Union must be dismissed.

POINT IV

THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENTS DID NOT CONDITION THE EMPLOYMENT OF ANTHONY BLONDELL ON WORKING FOR A NON-UNION COMPANY, THEREBY CAUSING HIS TERMINATION.

As this portion of the Complaint alleges a violation of Section 8(a)(1) and (3) of the Act, Acting General Counsel was required to show discrimination with a motive of encouraging or discouraging union membership. Lively Electric, Inc., 316 NLRB 471, 472 (1995). The discriminatory motive element derives from the "Hobson's choice" of an employee being

forced to decide between losing his job and giving up his right to be in the union. Id. That credible evidence shows that this did not happen in this case.

The credible evidence in the record shows that Anthony Blondell engaged in what the military would call an "SIE" (self-initiated elimination). Mr. Colacino testified that Mr. Blondell was a good employee, he had work for him, and had no intention of laying him off. Indeed, had Mr. Colacino wanted to rid himself of Mr. Blondell for discriminatory reasons he would never have agreed to rescind Mr. Blondell's June 29, 2012 termination. (GC Exs. 21 and 22). Both Messrs. Colacino and Barra testified that Mr. Blondell went to Mr. Colacino and that Blondell told Mr. Colacino that he needed to lay Mr. Blondell off for lack of work by July 20, 2012, the anniversary date of the Letters of Assent C that had been terminated. Hence, Mr. Blondell was the quintessential SIE.[13]

Mr. Blondell admitted that Mr. Colacino never told him to quit the Union. (Tr. 148). Moreover, it was clearly left up to the employees in the Union (Messrs. Blondell, Barra, and Bush) to decide what they wanted to do when Mr. Colacino terminated the Letters of Assent C with the Union. Scott Barra testified that Mr. Colacino had nothing to do with his decision process to: (1) either stay employed at Colacino or not; or (2) to remain a Union member or not. (Tr. 275). On the other hand, Business Agent Mike Davis specifically told Mr. Barra that they [the Union members employed by Colacino] could not stay members of the Union and continue to work for Colacino after July 20.[14] (Tr. 274). Mr. Davis told them that if Mr. Colacino went

[13] The speculative mental gymnastics that the ALJ went through to discredit the testimony of both Mr. Colacino and Union member and former Union officer Scott Barra is nauseating (ALJD pages 18-19). The ALJ provided no rationale in particular for why he disbelieved Mr. Barra and there was no discussion of the evidence adduced by Respondents (discussed below) supporting the testimony of Messrs. Colacino and Barra.

[14] This is also further proof that Mr. Davis redated NE 2.0's Letter of Assent C to run concurrently with Colacino's Letter of Assent C which had a 1 year anniversary end date of July 20.

non-Union he would pull them all back from Colacino. (Tr. 274). Although Mr. Barra was aware that Mr. Davis had permitted other Union members go to a non-active status and work for a non-Union employer, Mr. Davis refused Mr. Barra's request to go to non-active status so that he could remain employed by Colacino. (Tr. 274). Mr. Barra also testified that had he elected not to resign his Union membership and had continued after July 20 to work for Colacino the Union would have brought him up on charges.[15] (Tr. 274). In the end, Messrs. Barra and Bush chose to resign from the Union and continue working for Mr. Colacino (GC Exs. 16 and 17) while Mr. Blondell, based on his much longer membership in the Union and its pension plan, decided to approach Mr. Colacino and ask Mr. Colacino to be laid off.

Clearly Mr. Colacino never conditioned Mr. Blondell's employment on quitting the Union or in any way caused Mr. Blondell to terminate his employment. Mr. Colacino would happily have employed Mr. Blondell as a non-Union company just as he did prior to signing Colacino Industries to a Letter of Assent C with the Union. Thus, the separation letter Mr. Colacino wrote at Mr. Blondell's behest plainly bespeaks an employer that did not want to lose Mr. Blondell as an employee; *viz.*, *"Your employment here was sincerely appreciated and you are considered to be among the best in the trade. That said, I hope the future holds opportunities for us to work together again."* (GC Ex. 23). Accordingly, it is submitted that the portion of the Complaint alleging that the Respondents conditioned Mr. Blondell's employment on working for a non-Union company must be dismissed. Mr. Colacino never placed any conditions whatsoever on Mr. Blondell's employment. The evidence conclusively establishes that Mr. Blondell was an SIE based on his own personal reasons.

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[15] Mr. Blondell steadfastly denied knowing whether the Union could bring him up on charges or otherwise discipline him if he continued to work for Colacino after July 20 and was still a member of the Union. (Tr. 147). Consequently, from Mr. Blondell's perspective, based on his testimony, there was seemingly nothing preventing him from remaining a Union member and working for Colacino after July 20; just has he had done before Mr. Colacino signed the first Letter of Assent C in February 2011.

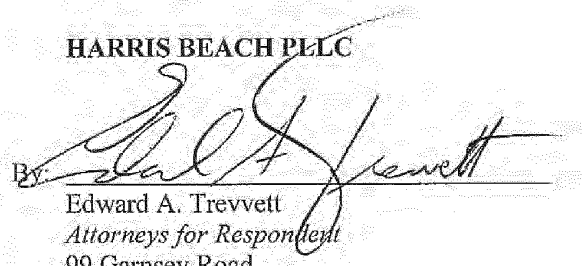
IV. CONCLUSION

For the foregoing reasons Respondents respectfully request that the Board sustain their exceptions to the Administrative Law Judge's Decision and dismissed the Complaint in its entirety.

Dated: January 30, 2014
Pittsford, New York

Respectfully submitted,

HARRIS BEACH PLLC

By: 

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NEWARK ELECTRIC CORP.,
NEWARK ELECTRIC 2.0, INC.,
AND COLACINO INDUSTRIES, INC.,
a single employer and/or alter egos

and **Case No. 3-CA-088127**

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 840

STATEMENT OF SERVICE

I, ANGELA CLARKE, the Legal Administrative Assistant to one of the attorneys for the Respondents, hereby certify that I caused a true and complete copy of the Respondents' Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions to the Decision of the Administrative Law Judge to be served, by causing same to be enclosed properly and securely in a sealed wrapper to be delivered via regular mail through the United States Postal Service on the 30th day of January, 2013, from the office of Harris Beach, PLLC to:

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